Supreme Court, U. S.
FILED
AUG 29 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977.

No. 77-322

DENNIS HOGAN,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS EX REL. PEYTON H. KUNCE, CIRCUIT JUDGE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

May it please the court:

Petitioner Dennis Hogan prays that a Writ of Certiorari be issued to the Supreme Court of Illinois for review of the judgment of that Court reflected by its opinion as herewith submitted (Appendix, A-27, *et seq*).

A. REFERENCE TO REPORTS.

The opinion of the Supreme Court of Illinois, review whereof is here sought, is reprinted in the Appendix to this Petition (A-27). It has not yet been published in the official reports.

The opinion of the Appellate Court of Illinois in this cause is reported at 37 Ill. App. 3d 573. It is also reprinted within the Appendix of this Petition (A-8).

The order of the trial court is unreported, but is included in the Appendix (A-1).

B. STATEMENT OF JURISDICTION.

(i) The judgment of the Illinois Supreme Court was entered on June 1, 1977.

(ii) There has been no request for an extension of time within which to petition for certiorari, and no request for rehearing.

(iii) This Court's jurisdiction is conferred by Title 28 U. S. Code, § 1257(3).

C. QUESTIONS PRESENTED FOR REVIEW.

1. May the criminal contempt power be exercised to punish conduct which was not accompanied by any criminal intent?

2. Where it is uncontradicted that a suit was filed for the purpose of meeting the problems of standing which precluded consideration of the merits in *O'Shea* v. *Littleton*, 414 U. S. 488, and where the suit contains no disrespectful language, may the very filing of that action be punished as an act of criminal contempt?

3. Where a contempt adjudication is predicated indiscriminately upon a series of actions, some of which are constitutionally protected, may the adjudication be affirmed by holding that some of the contemnor's actions were not constitutionally protected?

4. Where a judge is named as a party defendant to a lawsuit, may he respond to that suit by issuing a contempt citation against the plaintiff on the theory that the suit is contemptuous because it was groundless or untimely, thereby effectively ruling on the merits of his own litigation?

5. Where the chief judge of a state judicial circuit states that "all the judges in the circuit, the majority thereof" wish to

prevent a lawyer from conducting litigation before them, and a contempt citation is subsequently filed against that lawyer by one of those judges, may the lawyer's request that the citation not be heard before any judge of that circuit, be denied on the grounds that the request is overbroad?

D. CONSTITUTIONAL PROVISIONS.

Amendment XIV to the Constitution of the United States provides in relevant part as follows:

> "No state shall * * * deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

No state or federal statute is involved in this Petition.

E. STATEMENT OF THE CASE.

Petitioner, a lawyer and public defender, acted as attorney for one James Coleson, who had been indicted in state court for perjury. The perjury consisted in an allegedly false application for public welfare assistance. It was the state's theory that Coleson had improperly applied for public assistance while receiving income from private employment, and that his signing of the application for welfare benefits constituted perjury.

As Coleson's lawyer, petitioner asserted several defenses. He demurred to the indictment on the grounds that it failed to charge an offense. He also challenged the sufficiency of the evidence. There was a serious question concerning Coleson's literacy—a significant matter because the alleged perjury consisted in Coleson's signing an application prepared for him by a welfare official. There was also a dispute as to whether Coleson had been employed while receiving public assistance.

Coleson was convicted at a jury trial over which circuit Judge Peyton Kunce presided. Post-trial motions were filed

by respondent, pursuing his theories of defense. Those motions were pending throughout the ensuing events.

The Presentence Investigation and the First Charge of Contempt.

Judge Kunce ordered an extensive presentence investigation and directed the probation officer to report back as to "what makes (Coleson) tick". He noted that in the past petitioner had advised clients not to cooperate in such investigations on Fifth Amendment Grounds, and he warned petitioner against any such conduct in this case.

Coleson had not testified at the trial. Pursuant to the judge's mandate, however, the probation officer attempted to determine the extent of Coleson's literacy, as bearing upon his employment prospects if placed on probation. On the same rationale, he sought to determine Coleson's employment history during the period when such employment would have constituted welfare fraud and would have rendered the welfare application perjurious. He also inquired whether Coleson felt remorse for the offense of which he had been convicted, and as to whether he believed that his trial had been a fair one.

On petitioner's advice, Coleson refused to answer those questions. Judge Kunce thereupon threatened petitioner with contempt and ordered Coleson to aswer the questions. He further granted Coleson immunity, although there was no statutory warrant for any such action. The scope of that immunity was the subject of subsequent controversy, but it was conceded that any information thus derived would be used to determine Coleson's sentence.

On petitioner's advice, Coleson persisted in his refusal to answer any questions dealing with the accusation against him. Judge Kunce cited both petitioner and Coleson for contempt, on the theory that their refusal to provide the requested information had impeded the court's sentencing function.

That charge, however, was not filed until Coleson's civil suit, hereafter discussed, had been commenced. It was joined in a

multiple-count citation with the contempt charges stemming from the filing of that civil suit.

The Second Contempt Charge:
The Civil Suit.

For some time, bail practices in the Alexander County area had generated very substantial controversy. Civil litigation had been filed in federal court against a prosecutor and judge in that county. The district court dismissed the action. The Court of Appeals ruled that a cause of action had been stated, and remanded the case for trial. *Littleton* v. *Berbling* (7 Cir. 197) 468 F. 2d 389. On subsequent review, this Court reversed. Your Honors held that those plaintiffs who had never been prosecuted lacked standing to complain, and that the standing of those who had been prosecuted had terminated with the conclusion of their prosecutions. *O'Shea* v. *Littleton* (1974) 414 U. S. 488. Thus, it was clear that standing to complain of the bail practices would exist only in the case of a plaintiff presently under criminal charges.

Petitioner had been among those primarily concerned with the Alexander County bail practices. He concluded that Coleson's case presented an ideal test vehicle. Petitioner believed that the evidentiary failures and the facial insufficiency of the indictment were sufficient to assure that the filing of a civil suit on Coleson's behalf could not expose Coleson to the jeopardy which might attach in a more sensitive situation. He also concluded that to file the suit after verdict but before judgment, would avoid the mootness problem expressed in *O'Shea*, while also avoiding the policy objections to collateral interference in a pending criminal case, *Younger* v. *Harris*, 401 U. S. 37 (R. 35-37).

Accordingly, on Coleson's behalf and with his approval, Hogan filed a civil action against all the judges who had handled bail questions concerning him. The complaint sought declaratory

judgment and punitive damages by reason of the denial to Coleson of release on his own recognizance; the setting of a cash bail in a proceeding in which he was not represented by counsel; and the switching of Coleson's previously posted bond to cover a subsequent consolidated action in a superseding indictment embracing additional parties.

Judge Kunce, a defendant to the civil action, adverted to the case when Coleson next appeared before him. He advised Coleson that he was thinking of granting him probation, but did not wish to exercise such indulgence toward "anybody that I think will commit another crime . . ." (R. 400-S). "Therefore" he asked Coleson whether the suit had been filed at Coleson's personal instance, or at the urging of petitioner (R. 401-S). He urged Coleson to disregard petitioner's advice and answer his questions about the pending suit (R. 402-S-403-S) finally asking Coleson: "Do you want probation in this case?" (R. 404-S).

Judge Kunce subsequently cited the filing of the civil suit as two separate counts of contempt. One count alleged simply that any suit should have been delayed until sentence had been passed (C18). The other count alleged that the filing of the suit was contemptuous because the "complaint has no basis in law or in fact"; that it was "spurious, invented and contemptuous per se"; and that it was not filed "in good faith . . . but so as to hinder, delay or impede the administration of criminal justice . . ." (C19).

The Conclusion of the Coleson Criminal Case.

After entering the contempt citation, Judge Kunce imposed sentence on Coleson: Probation, fine and one year's periodic imprisonment.

That judgment was reversed by the Appellate Court, Fifth District. The reviewing court sustained Petitioner's contention that the indictment was inadequate to charge an offense, and

therefore did not reach the other claims of error. *People* v. *Coleson*, 25 Ill. App. 3d 43 (1975).

The Outcome of the Civil Action.

The civil suit was dismissed in the trial court on motion. That judgment was affirmed on appeal. *Coleson* v. *Spomer*, 31 Ill. App. 3d 563 (1975). The Appellate Court held that the prosecutor and judges were acting within their official authority, and enjoyed immunity with respect to their acts, so that the only remedy to improper bail was by way of appeal. That court also indicated that the allegations of the complaint were inadequate to state a cause of action.

The Hearing of the Contempt Charges.

A. DISQUALIFICATION OF THE JUDGE.

On his own motion Judge Kunce directed that the contempt citations be heard before a different judge. The Honorable John Clayton, Chief Judge of the circuit, assigned himself to hear the case.

Respondent moved for the assignment of a judge from outside the circuit (C32).

One document appended to that motion was the affidavit of Patrick J. Hughes, an attorney who acted as coordinator for the Illinois Defender Project survey. The Illinois Law Enforcement Commission had awarded a grant for the establishment of a public defender system in the First Judicial Circuit. However, it was a condition of that grant that respondent be continued as public defender "unless he is found unqualified by the Governing Board" (C33). Judge Clayton had told Mr. Hughes that his Circuit would not accept funds for a public defender system if Petitioner were to remain as defender (C35). Petitioner urged that an adverse adjudication in the contempt

proceedings might be viewed as disqualification, thus enabling Judge Clayton's Circuit to accept the public defender grant while disqualifying Petitioner as public defender (C33). Judge Clayton overruled the motion, stating that he had disclosed to Mr. Hughes only "the opinions and attitudes of all the judges in the circuit, the majority thereof"; that those opinions did not "necessarily reflect the opinions of myself"; and that he had told Mr. Hughes "that I was not relating any feeling that I might have personally toward (Petitioner)" (Tr. 6).

Judge Clayton provided no further information on the issue, except to say that he felt that he could be fair (Tr. 6).

B. The Evidence.

By agreement of the parties, Petitioner waived his discovery motions; the state waived all responsive pleadings, with the agreement that respondent's failure to answer would not be considered an admission; and the case proceeded to immediate hearing, the evidence being received by stipulation (Tr. 28).

At the hearing, the prosecution's presentation dealt almost exclusively with Count I, charging Petitioner with contempt for advising his client not to answer the questions of the probation officer.

In support of that count, the prosecution submitted to the court extensive transcript references from the original Coleson prosecution and the reports of the probation officer (Tr. 28-33).

As to Counts II and III (which relate to the filing of the suit against Judge Kunce) the prosecution offered only the complaint filed in that case (Tr. 29) and the fact that Judge Kunce "as indicated by the rule to show cause, felt that the complaint was not filed in good faith to obtain the relief prayed for but so as to hinder, delay or impede the administration of criminal justice and to interfere with judicial processes and embarrass the court so as to lessen the court's dignity and authority."

The State expressly conceded that except for Judge Kunce's opinion as expressed in the "verified rule to show cause",[1] there was no evidence to substantiate the allegations as to the purpose or effect of the filing of the suit (Tr. 34).

Hogan's stipulated testimony as recounted in the Appellate Court opinion (A. 17) showed that the timing of the suit had been determined in light of this Court's *O'Shea* decision. There was no rebuttal by the State.

C. The Judgment.

The trial judge took the matter under advisement. Subsequently, by mailed order, the trial judge found both respondents guilty. By the same order, and without any hearing in aggravation or mitigation, he imposed on respondent Hogan a $2,250 fine; a thirty-day jail sentence; and reference to the Illinois lawyer disciplinary authority for professional sanctions (C105-C106).

The $2,250 fine was imposed at the rate of $750 for each of the three counts. Jail sentences of thirty days were imposed concurrently as to each of the three counts. The reference for professional discipline was undifferentiated as among the several counts.

The Decision of the Appellate Court.

On petitioner's appeal, the Illinois Appellate Court reversed the entire judgment without remand.

The Appellate Court held that petitioner's act in advising Coleson not to speak to the probation officer, had been correct; would not be contempt even if it had been erroneous; and was

1. The rule as originally prepared contained an acknowledgment contemplating that the judge would swear to the allegations before the Clerk. However, Judge Kunce did not make use of that portion of the document (C20). It would have been an obvious absurdity for a trial judge to sign a court order under oath, and no "verified" rule to show cause exists.

constitutionally privileged under the doctrine of *Maness* v. *Meyers*, 419 U. S. 449 (1975) (A. 8, 15).

The Appellate Court also held that the filing of the civil suit had not been contemptuous. The court reviewed the *O'Shea* and *Spomer* litigation (A. 16-17) and held that against that background, and in the absence of any evidence of criminal intent on petitioner's part, the filing of the civil suit could not be held to be an act of contempt (A. 19-20).

Although agreeing with the reversal of the contempt charge based on petitioner's advice to his client, one appellate judge dissented from the reversal of the counts based on the filing of the civil suit. It was his position that the filing of the complaint against Judge Kunce during the pendency of Coleson's sentencing, was contempt *per se* (A. 23-24). He also stated that contempt was determined by the act of an offender rather than by his intent (A. 26).

The Decision of the State Supreme Court.

The prosecution appealed to the Illinois Supreme Court. This appeal was limited to the contempt charges deriving from the filing of the civil suit. The state did not seek review of the reversal of the contempt charge based upon petitioner's advising his client to remain silent before the probation officer.

The Illinois Supreme Court reversed the Appellate Court in part (A. 27). It held that proof of wrongful intent is not required to support a charge of criminal contempt (A. 29-30). The court also held that the allegations of the petition of substitution of judge had been insufficient and that therefore it was not error to have denied that petition (A. 31). However, the Illinois Supreme Court ruled that the filing of the civil suit justified only one count of contempt, rather than two, and that the jail sentence should not have been imposed without hearing. Accordingly, it affirmed only that portion of the penalty which consisted in a fine.

F. STAGE AT WHICH FEDERAL QUESTIONS WERE RAISED.

The petitioner's federal constitutional claims were promptly and properly raised at every stage. He urged that his conduct had been privileged under the Fifth, Sixth and Fourteenth Amendments to the Constitution (Tr. 7, 8), and expressly claimed that his client had had a Fifth Amendment right to withhold disclosures from the probation officer (Tr. 10, 37, 47-48), and that petitioner's duty to protect that privilege was rooted in the Sixth Amendment right to counsel (Tr. 50).

In the trial court, petitioner argued that federal due process rights precluded a contempt adjudication predicated upon conduct which did not obstruct the court in the discharge of any proper function, and which may have reflected the personal sensibilities and involvement of the judge who issued the citation (Tr. 74-75). In support of his request for substitution of judges, petitioner expressly relied on this Court's decision in *Mayberry* v. *Pennsylvania*, 400 U. S. 455 (1971) (Tr. 4).

Later, Petitioner was granted leave to supplement his brief to the Illinois Supreme Court by citing this Court's subsequent per curiam order in *Connally* v. *Georgia*, No. 76-461, 45 LW 3461, as additional authority in support of his contention that the denial of his motion for substitution of judges had amounted to denial of federal due process.

It was not until the contempt adjudication had been reversed by the Appellate Court that the state, petitioning for leave to appeal to the state supreme court, first contended that Petitioner's intent was irrelevant to the contempt citation.[2]

In response to that contention, petitioner argued that the application of that principle to him would be a denial of federal due process (Brief, pp. 15-18).

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2. This position was first expressed by the dissenting judge in the appellate court, A. 21-23. Until that time, the state had argued that the civil suit had been filed as a part of the same basic scheme which led to refusal to provide the requested information to the probation officer: An attempt to interfere with the sentencing of Coleson (Tr. 81-86); state appellate brief 22, 23, 27-28).

In sum: Petitioner's federal constitutional arguments were properly raised and urged at every appropriate stage.

G. FEDERAL PROCEEDINGS.

No federal proceedings have been had in this matter.

H. REASONS FOR ALLOWANCE OF THE WRIT.

The Special Sensitivity of Contempt Proceedings.

It may be doubted that any area of the law presents issues of importance to the administration of justice with such frequency as does the subject of contempt. And it seems most improbable that any case will ever be presented to your Honors implicating a broader spectrum of significant contempt issues than does the case at bar.

The tendency of the contempt remedy to generate issues of significance (*U. S.* v. *Wilson*, 421 U. S. 309; *Juidice* v. *Vail*, 45 L. W. 4269; *Menna* v. *New York*, 423 U. S. 61) and to require review of prior doctrine (*Muniz* v. *Hoffman*, 422 U. S. 454) is a natural product of the nature of that remedy. Its convenience as a vehicle for the vindication of the objectives of a court tends to diminish the likelihood that its employment uniformly will be characterized by restraint.

The contempt power was originally designed and exercised as a means of punishing utterances deemed disrespectful toward the sovereign, his ministers, or other public officials. Largely in consequence of an adverse public reaction to the sedition laws enacted during the administration of the elder President Adams (*State* v. *Shepherd*, 177 Mo. 205, 76 S. W. 79, 84 (1903)), the contempt concept has survived in the United States almost exclusively as an instrument of the Judicial branch of government (6 R. C. L. Contempt, § 2). It is generally defended on the ground of necessity, as a means of assuring compliance with the judicial decrees and an unobstructed judicial process; but no knowledgeable person would discount

the impact of a judge's perception of personal affront and the possibility of an atavistic reversion to the employment of contempt process for individual vindication rather than as an instrument of public justice. *Craig* v. *Harney*, 337 U. S. 367, 376 (1947); *Brown* v. *U. S.*, 356 U. S. 148, 153 (1958); *Wood* v. *Georgia*, 370 U. S. 375 (1962). The use of the public contempt process to vindicate the personal sensibilities of the judge is not only constitutional anathema; it is counter-productive to the preservation of the dignity of the court and respect for judicial process. *Bridges* v. *California*, 314 U. S. 252, 270-1 (1941).

The *Shepherd* court, reflecting the doctrine of the time, imposed contempt punishment upon a newspaper editor who had published insulting comments concerning the court. The court noted that Blackstone had given a definition of contempt which included "speaking or writing contemptuously of the court or judges, acting in their judicial capacity" (76 S. W. at 84). In response to the suggestion that the First Amendment might preclude such a definition, the court stated that the Constitution conferred only "the right to tell the truth", and that it does not confer "any right to scandalize". (76 S. W. at 91)

The court proceeded to find that "the truth" was that the court had been guilty of no misconduct, so that any contrary suggestion was "scandal" and therefore punishable as contempt.

The *Shepherd* decision cites other instances of the invocation of the contempt remedy in response to an insult to a judge, unaccompanied by any impairment of the judicial function. Ultimately, this Court found it necessary to rescue the First Amendment from the crippling effect of contempt citations issued for the personal vindication of the relator. *Wood* v. *Georgia*, 370 U. S. 375 (1962).

Wood reflected the ultimate reality of the American political system. In that system, the courts are the ultimate safeguard against autocratic action. Conversely, there can be no autocratic action within that system, absent judicial acquiescence.

And logic compels acceptance of the corollary: Within the American political system the most dangerous of authoritarian practices, and those most resistant to rectification, are those perpetrated by judicial officers.

As previously noted, this Court has abrogated the *Shepherd* doctrine; but the undertaking has required reiterative instruction. *Holt* v. *Virginia*, 381 U. S. 131 (1965). It is quite beyond the power of this or of any court, to shape a pandemic attitude of respect for constitutional guarantees. One need not have occupied a position of authority, in order to appreciate the tempting attractiveness to any incumbent of such a position—industrial, educational, military or governmental—of an atavistic reversion to a time of lesser restraint on the exercise of that authority. We would urge that the judiciary performs its most important service in providing protection against temptation; and that this Court has no more significant function than to provide corrective process when a judicial officer, in the management of his office, disregards the constitutional restraints upon the exercise of his authority.

• • • • •

That same coin has another side. The rights of the individual must not be exercised in such manner as to threaten the independence of the judiciary. The grave constitutional significance of the protective function of the courts, as argued in this very petition, commands the power to deal effectively with impairment to the discharge of that function. The contempt power, indispensable to the preservation of constitutional guarantees, possesses a unique potential for collision with those same constitutional safeguards. It is of the gravest important that the boundaries be clearly marked for the guidance of all concerned. A judiciary impotent in the face of a challenge to its proper authority, reflects a constitutional disaster; and no less so, the nobility-commoner relationship described by Blackstone, characterized by a judiciary using its contempt power to vindicate its sense of self-esteem.

The Respondent purports to view this case as a challenge to the authority of the courts (State's appellate brief, p. 23). Petitioner, on the other hand, has consistently urged that the case reflects a threat to First, Fifth and Sixth Amendment values through the arbitrary and unjustified use of the contempt remedy to vindicate the claims of the judge-relator. But neither party, we are confident, would challenge the significance of this case in the delineation of the boundary above mentioned.

Malicious Intent Is a Necessary Element of Criminal Contempt.

There remains one aspect of the Blackstone view of the judge-citizen relationship, which has not been directly presented to this Court in *Wood* v. *Georgia*, 370 U. S. 375; in *Holt* v. *Virginia*, 381 U. S. 131; or in any comparable case.

Consistent with the view of officialdom as a specially privileged elite, it was the traditional English view that if such a person were offended, the intent of the offender was irrelevant. Thus, the *Shepherd* court quotes Baron Huddleston as authority holding that it is no defense that the maker of an insulting utterance "honestly believed in the truth of the charges he was making . . ." *Shepherd* also places reliance on a Queen's Bench utterance to much the same effect, 76 S. W. at 96.

Shepherd was not unique. In a strikingly similar case, *Coons* v. *State* (Ind. 1922), 134 N. W. 194, 20 ALR 900, grand jurors were held in contempt for filing a report critical of the judge. *Coons* held, *inter alia*, that the grand jurors were not entitled to show that they did not intend to impair the authority of the court, because their intention was irrelevant: The court's dignity had been offended, and the offender must pay.

As noted, this Court has uncompromisingly abrogated the definitions of contempt which constitute the basic holding of

such cases as *Shepherd* and *Coons*. But the derivative doctrine of those cases—that intent is irrelevant where one's actions offend a judge—has to this time escaped the scrutiny of this Court.

And *Coons* begat *Kniesel* v. *Ursus Motor Company* (1925), 316 Ill. 336, 343, 342 wherein the Illinois Supreme Court, relying exclusively on the holding of *Coons*, held that guilt of contempt "depends upon the act and not the alleged intention of the offending party".

And *Kniesel* begat *Anderson* v. *Macek* (1932), 350 Ill. 135, wherein the doctrine was reiterated.

And in the case at bar, *Anderson* and *Kniesel* are employed as the basis of a holding that intent is irrelevant in a contempt proceeding.

Thus in 1977, the vestigial remnants of *Coons* and of *Shepherd* are resurrected to impress upon petitioner guilt without criminal intent.

In ensuing portions of this brief we will argue that the notion of irrelevance of intent has been used in this case to frustrate ventilation of a pressing social grievance.

But the doctrine itself suffers facially from serious due process deficiencies.

Let us at once distinguish civil contempt. The civil contemnor may ordinarily purge his contempt by complying with the court's order; accordingly, the intent which initially may have motivated disobedience is truly irrelevant to the contempt adjudication. That this distinction is not made by the Illinois court, is apparent from its partial reliance (A. 30) on *People* v. *Denson* (1975), 59 Ill. 2d 546, which was essentially a case of civil contempt (59 Ill. 2d at 556) involving a legally inadequate reason for refusal to testify.

Such contempt proceedings, whose purpose is to compel compliance rather than to punish, simply do not provide a logical parallel upon which to decide guilt of criminal contempt. The

purpose of a criminal contempt proceeding is punishment of past conduct. It is frightening to contend that such conduct was criminal even though the actor's intent may have been innocent.

This is a distinction which is well stated by *In re Brown*, 454 F. 2d 999, 1007 (D. C. Cir. 1971) holding:

> ". . . good faith pursuit of a plausible though mistaken alternative is antithetical to contumacious intent, however unimportant it may be in the context of civil contempt. And proof beyond a reasonable doubt that the alleged contemnor possessed the required intent must forerun a criminal contempt conviction."

Although a federal contempt was involved, *Brown's* principles are not based on a construction of the federal contempt statute. *Brown* analyzes the structure of contempt, and concludes that contumacious intent is a prerequisite to every criminal contempt (454 F. 2d at 1003), and "all the more so" in the light of the federal statute (454 F. 2d at 1006).

With rare exceptions, criminal guilt has always depended upon proof of a "vicious will". 4 Blackstone, *Commentaries* 21; Pound, Introduction to Sayre, *Cases on Criminal Law* (1927); *Morissette* v. *United States*, 342 U. S. 246, 250, 274-276 (1952).

The most definitive of recent federal expressions on this issue is *United States* v. *Seale*, 461 F. 2d 345, 367, 368 (7 Cir.) expressly holding that criminal intent is an indispensable element of criminal contempt. *Seale* turns on the federal law of contempt; but in this context, it cites *Morissette*, *supra*, whose reference to *Tot* v. *United States*, 319 U. S. 463 (1943) raises clear due process implications.

The definition of the offense of criminal contempt is necessarily a vague one; it must be so if the courts are to be enabled to meet a myriad of wrongful challenges to their authority. But in analogous contexts, statutes have been rescued from a due process challenge of vagueness by the interposition of the re-

quirement of proof of specific intent. *Boyce Motor Lines* v. *United States,* 342 U. S. 337, 342 (1952); *Screws* v. *United States,* 325 U. S. 91, 101-102 (1945); *Hygrade Provision Co.* v. *Sherman,* 266 U. S. 497, 501 (1925). To hold, as the State would urge, that conduct may be punished as criminal contempt regardless of the intent of the actor, would result in a clear denial of due process. *Smith* v. *Goguen,* 415 U. S. 566, 572-576, 578 (1974). Because this case involved a charge of criminal contempt, the Appellate Court majority was eminently correct in requiring proof of *mens rea.* Deviation from that standard is an ominous denial of due process.

The Filing of Litigation Reasonably Designed to Redress a Broadly-Based and Continuing Grievance, May Not Constitutionally Be Punished as Contempt.

Recent decisions of this Court have lengthened the reach the doctrine of abstention. *Juidice* v. *Vail,* 430 U. S. ....., 45 L. W. 4269 (1977); *Trainor* v. *Hernandez,* 431 U. S. ....., 45 L. W. 4535 (1977); *Bellotti* v. *Baird,* 428 U. S. 132 (1976).

The abstention doctrine, however, is not intended as a vehicle for the denigration of constitutional rights. It is intended to lend vitality to the concept of federalism, and it proceeds upon the assumption that the state judiciary will be no less willing than their counterparts on the federal bench, to recognize and enforce constitutional principles. *Huffman* v. *Pursue, Ltd.,* 420 U. S. 592, 604 (1975). Abstention will quickly degenerate into a coded formula for the avoidance by state officers of all constitutional limitations upon their actions, unless that doctrine is balanced by a refusal to permit the same state officials in whose favor this Court has abstained, to repress the opportunity for ventilation of the grievance within the state's judicial machinery.

As previously noted, the prosecutor argued that the civil suit against Judge Kunce had been filed "because certain people felt that bail bond provisions may have been incorrectly handled here in Alexander County (R. 83)".

A great many people so felt—among them a panel of the Court of Appeals for the Seventh Circuit. *Littleton* v. *Berbling,* 468 F. 2d 398. The subsequent reversal by this Court, essentially for want of standing in the plaintiffs (*O'Shea* v. *Littleton,* 414 U. S. 488), cannot possibly be construed as an expression of approval by this Court of any act alleged by the *O'Shea* plaintiffs, nor as a reflection of an absence of concern for their constitutional plight.

Petitioner had been one of the persons strongly concerned with the problems reflected by the *O'Shea* plaintiffs. Reviewing your Honor's decision in that case, he reached the following conclusions:

1. That standing to present the grievance would exist only in favor of a plaintiff who was then held to bail.

2. That the doctrine of *Younger* v. *Harris,* 401 U. S. 37 would create serious difficulties for such a plaintiff in a federal forum if his action were viewed as one creating an interference with a pending state criminal action.

3. That even in state court, the position of such a plaintiff would be strongest during the period between the rendition of guilty verdict and the entry of final judgment. During that period, interference with the prosecution would not be a meaningful factor, but standing would not yet have been lost. Necessarily, however, fulfillment of such narrow conditions would preclude a class action, and only a single plaintiff would be likely to qualify as a practical matter.

4. That the deficiencies in the indictment and proofs in Coleson's case, effectively immunized Coleson against retaliation, and render his situation an appropriate test

vehicle for the attempted amelioration of Alexander County bail practices.

These were reasoned, lawyer-like determinations. To characterize the resulting litigation as contempt, is to commit the ultimate First Amendment violation: Not merely to deny, but to penalize the exercise of the right to petition for redress of grievance within the judicial structure itself.

Your Honors have recognized the impracticality of attempting to litigate pretrial detention issues within the framework of a defense to a criminal prosecution. *Gerstein* v. *Pugh*, 420 U. S. 103, 108 n.9 (1975). Extrinsic litigation is required, but all avenues seem blocked. The "Catch 22" approach to bail reform in Alexander County, as reflected by the judgment below, may be summarized thus: Only an accused can complain of improper bail practices. After judgment, his standing to do so is lost. Prior to judgment, his doing so constitutes criminal contempt of court.

The Illinois Supreme Court would validate that result on the theory that the test case could have been filed without naming Judge Kunce as a defendant (A. 30). Any such suit, however, would almost certainly have failed. Ratification by Judge Kunce of the bail set at earlier stages, would likely be held to have mooted any complaint concerning the acts of the judge who originally set that bail, since the same bail would ultimately have been required in any event by order of Judge Kunce. And at any event, the Illinois Supreme Court's approach is a violation of the doctrine of *Eaton* v. *Tulsa*, 415 U. S. 697 (1974). Judge Kunce's contempt citation was predicated on the fact that the suit lacked all base as "a cause of action for damages or other relief against this Court or others named therein as co-defendants" (C19). To affirm that citation on the theory that the suit was improper because it included one defendant too many, is to convict the petitioner of a charge never made against him. *Eaton* v. *Tulsa, supra*, 415 U. S. at 699. (The implications of *Eaton* in other contexts are considered in the following segment of this petition.)

Petitioner drafted a civil complaint which assuredly was something less than a masterpiece of pleading. Its underlying premises, however, were reasonable, and its intended function was socially constructive. It contained no scandalous or improper language. Its amenability to improvement is a quality which it shares with every pleading ever written. It can be punished as contempt only at intolerable constitutional expense.

A Contempt Conviction May Not Be Salvaged on Review by Deleting from the Judgment Its Constitutionally-Prohibited Elements.

Due process irreducibly requires that a contempt proceeding be affirmed on the basis upon which it is imposed, or not at all. It is a clear due process denial to affirm a contempt conviction on the premise that although the original basis of the contempt citation was inadequate, the record discloses another basis upon which that conviction might be salvaged. *Eaton* v. *Tulsa*, 415 U. S. 697, 699 (1974).

Judge Kunce's contempt citation alleges that the complaint against him "was not filed . . . in good faith to obtain the relief prayed for but so as to hinder, delay or impede the administration of criminal justice and to interfere with the judicial process . . ." (C19). The judgment repeats that same language (A. 5).

In both the trial and appellate courts, the prosecutor offered two theories of specific intent. First, the prosecutor argued that the civil complaint was simply a continuation of a course of conduct that began with respondent's advising Coleson to invoke the Fifth Amendment in response to the trial judge's inquiries. Both those actions, in his view, were designed to interfere with the imposition of a proper sentence on Coleson (R. 81-86). That argument was obviously accepted by the trial court, which rendered a judgment whose recitations treat the Fifth Amendment claim and the civil action as a coherent inter-related series of contemptuous actions (A. 2-5).

At another stage, the prosecutor argued that the civil suit had been filed "because certain people felt that bail bond provisions may have been incorrectly handled here in Alexander County" (R. 83). That is simply a different theory of specific intent.

Thus, the contempt citation alleged specific intent; the prosecutor argued specific intent; and the judgment found specific intent.

In his appellate brief, the prosecutor renewed his allegations of specific intent, arguing quite expressly that the court should find the requisite intent by considering the filing of the suit in conjunction with respondent's advice to Coleson to claim his Fifth Amendment privilege, and should not give separate consideration to petitioner's individual acts (Br. pp. 22, 23, 27-28).

And then came this court's decision in *Maness* v. *Meyers*, 419 U. S. 449 (1975). *Maness* held, on facts remarkably similar to those of the case at bar, that a lawyer had an absolute right to offer to his client good faith advice to decline on Fifth Amendment grounds a judge's request for disclosures.

The Appellate Court reversed petitioner's conviction, largely in reliance upon *Maness* (A. 8, 14-15).

The state then revised its position, and sought further review on the theory that intent was irrelevant to a charge of contempt (Petition for Leave to Appeal, pp. 8-10). That position was accepted by the Illinois Supreme Court (A. 29-30).

That shifting of the theory of guilt constitutes an aggravated instance of the due process violation condemned in *Eaton* v. *Tulsa*, 415 U. 697, 698-99 (1974). At no stage of the trial proceeding had it been suggested that the filing of the civil suit against Judge Kunce was contempt per se, regardless of petitioner's intent in so doing. Directly to the contrary, it had been alleged and found that the suit had been filed with an evil intent, all of a single piece with petitioner's act in advising his

client to claim his Fifth Amendment privilege against self-incrimination, thus thwarting the trial judge's inquiry concerning Coleson's background, and impairing his objectivity, all for the purpose of causing unlawful interference with the sentencing of Coleson. It was only after this Court's decision in *Maness* had unmistakably legitimated petitioner's advice to his client on constitutional grounds, that the theory of guilt was shifted—thus affirming the punishment of constitutionally protected conduct on the theory that that same punishment could have been awarded on a different basis.

The prosecutor's arguments to the trial judge and the contempt judgment itself leave no doubt that the filing of the civil action was treated as contemptuous largely because it was the continuation of a course of conduct which commenced with petitioner's advice to his client to claim his Fifth Amendment privilege rather than answer the trial judge's inquiries.

The trial court's findings (A. 2- A. 5) treat the two concepts—contemptuous silence and contemptuous filing—as inextricably inter-related.

But the silence was not contemptuous; it was proper beyond question. And petitioner's act in advising his client to claim his Fifth Amendment privilege, was not only constitutionally privileged but was the mandated discharge of petitioner's constitutional duty. *Maness* v. *Meyers*, 419 U. S. 449.

Where a contempt rests on "both a constitutionally protected act and one which may be unprotected, and a guilty verdict ensues without elucidation, there is an unacceptable danger that the trier of fact will have regarded the two acts as 'intertwined' and have rested the conviction on both together". *Street* v. *New York*, 394 U. S. 576, 588 (1969); *Eaton* v. *City of Tulsa*, *supra*, 415 U. S. 697, 699. Here the record not only fails to "negate the possibility" of such intertwining as required by *Street*, *supra*, 394 U. S. at 588; to the contrary, the record fairly shouts that petitioner's constitutionally protected conduct in advising his client not to talk to the probation officer is a crucial

element of the contempt citation. Although the Illinois Supreme Court does not address itself to this question, the point was argued vigorously by petitioner in that court (Brief, pp. 21-26), and the judgment of affirmance is a clear due process denial.

A Judge May Not Constitutionally Use His Official Process to Defend Himself as a Litigant.

A judge was sued. His first response was to threaten the plaintiff with denial of probation in a different case, unless the suit were disavowed. When that response was unsuccessful, plaintiff's attorney was charged with contempt—because, and only because, that defendant-judge used his official position to issue a contempt citation in the form of an adjudication that the suit against him had no merit (C18, 19).

The implications would be immediately disturbing even if all subsequent phases of the litigation had been conducted by a dispassionate jurist. It is the privilege of the American lawyer to attempt to persuade the judiciary to *change* the law. If those efforts are to be met with contempt citations issued by the defendants—whether judicial or legislative officers (cf. *Groppi* v. *Leslie*, 404 U. S. 496 (1972))—the privilege is relatively meaningless.

This was not a suit filed without reasonable justification. The citation so alleged; but the prosecutor conceded that the only support for that allegation was the opinion of the defendant-judge (Tr. 35). If the suit were deemed barred by a doctrine of judicial immunity, and unreasonable on that account, the defendant-judge might have costs, including attorney's fees, incurred in defending that suit. S. H. A. Ill. Stat., Chapter 110 § 41. In short, a judge wrongly sued would have the same rights as anyone else wrongly sued. To permit him to defend himself with a contempt citation, is an obvious denial of due process.

An Alleged Contemnor Has a Constitutional Right to an Impartial Judge.

In the immediately foregoing argument, petitioner conceded that this might be a different case if all proceedings on the contempt citation had been conducted before an impartial judge. But such was not the fact.

Of course, the defendant-judge did not rule on his own citation. But with equal force, that ruling was not made by a judge who was disinterested in the matter, nor by one whose presiding over the case created the appearance of impartiality.

Petitioner's complaint is not simply that the trial judge was a colleague of the defendant-relator-judge. The grounds for disqualification run much deeper, and render the denial of petitioner's motion for disqualification an error of constitutional dimensions.

Petitioner, a public defender in the Alexander County area, had apparently been something of a gadfly to the local judiciary. Even before the present controversy arose, he had come to the unflattering attention of the trial judge.

That judge was the Chief Judge of the circuit. In that capacity, he had been interviewed, before the present controversy arose, by a lawyer making a survey of public defender services in Illinois. The motion to disqualify the trial judge was supported by that lawyer's affidavit, swearing that the judge had told him that rather than have petitioner as public defender, he would prefer to have no public defender service whatever!

The motion for substitution went much further. It alleged that a grant for a public defender system had indeed been awarded to that circuit—conditioned, however, upon retention of the incumbent (this petitioner) if "qualified". The motion urged that a contempt conviction might cause petitioner to be viewed as "unqualified" as public defender, thus enabling the presiding judge to have his expressed wish—a federally funded

public defender system in which petitioner would not participate (C32-35).

The situation thus presented was almost indistinguishable from that characterized as a due process denial in *Ward* v. *Village of Monroeville*, 409 U. S. 47 (1972). The head of a governmental system which would benefit from a conviction, undertook to preside over a criminal case in the face of a specific motion for his disqualification.

The trial judge rejected the motion for his disqualification, stating that he had disclosed to the affiant attorney only "the opinions and attitudes of all the judges in the circuit, the majority thereof"; that those opinions did not "necessarily reflect the opinions of myself"; and that he had told the surveying lawyer "that I was not relating any feeling that I might have personally toward (petitioner)" (R. 6).

The language employed by the trial judge in denying the motion for disqualification, may fairly be viewed as an unfortunate exaltation of form over substance in a sensitive issue of self-interest. The judge did not deny the circumstances, which were strongly indicative of personal bias. He did not even deny the *fact* of bias. Instead, he denied only that he had expressly *said* that he was biased, and foreclosed further inquiry into the matter.

The judgment ultimately entered did nothing to dispel the suggestion of bias. In addition to imposing a jail sentence by mail without any hearing on the issue of penalty, the trial judge also ordered, *sua sponte*, that the matter be referred for possible disbarment action (A. 7). Thus, the trial judge undertook a course of action which need not have been different in any degree if its purpose had been to achieve his expressed wish: Petitioner's disqualification from participation in a federally funded public defender system.

The Illinois Supreme Court approved that action on a premise never urged or argued in the proceedings. It held (A. 31) that the motion for substitution of judges contained only "general

allegations of prejudice"—a flat defiance of the record. Petitioner made allegations of almost unprecedented specificity C32-35). The state court held that where the motion is "general", the naming of more judges than is authorized by the state statute warrants denial of the entire motion. Assuming that to be the law of Illinois, it has no possible relevance to this case. Here, the presiding judge himself had stated, as previously quoted, that "all the judges in the circuit, the majority thereof" desired petitioner's disqualification as public defender, a result attainable by conviction of contempt. Petitioner stood accused by one of those same judges. In that circumstance, there is nothing overbroad in a motion which asks that the case be heard by a judge who is not a member of that group; and a petition which details those facts cannot be characterized reasonably as containing nothing more than a mere "general allegation of prejudice."

If it is truly the law of Illinois that a motion for the assignment of an out-of-circuit judge is unauthorized where that motion recites that the movant's adversary is a judge of the circuit, and that the chief judge of the circuit has stated that his colleagues wish ill toward the movant, then the law of Illinois cannot survive constitutional scrutiny.

And when the chief judge of that circuit, faced with a motion for disqualification, responds that he disclosed only the attitude of his colleagues—that he had not disclosed and *will not now disclose* his attitude toward the movant—he has assuredly provided no basis for any expression of confidence in his impartiality. Indeed, he has done little if anything to inspire confidence in any dimension of the judicial function at any level.

Respectfully submitted,

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(312) 427-2737,
Attorney for Petitioner.

APPENDIX A.

TRIAL COURT JUDGMENT

STATE OF ILLINOIS
IN THE CIRCUIT COURT OF THE FIRST JUDICIAL CIRCUIT
Alexander County

THE PEOPLE OF THE STATE OF ILLINOIS, *vs.* JAMES COLESON, *Defendant.*	No. 73-CF-22 Perjury

THE PEOPLE OF THE STATE OF ILLINOIS EX REL. PEYTON H. KUNCE, CIRCUIT JUDGE, *vs.* DENNIS HOGAN AND JAMES COLESON, *Respondents.*	Contempt

ORDER

And now this cause coming to be heard on a Rule to Show Cause filed April 11, 1974, in the Circuit Court of the First Judicial Circuit, Alexander County, Illinois, and due and timely notice was given to the Respondents Dennis Hogan and James Coleson to answer and present argument in defense of the Rule to Show Cause and the Court having heard the evidence available to the State of Illinois and the Respondents in support of their respective positions, and having read the transcripts and heard the arguments of counsel, and being now fully advised in the premises:

IT IS THE FINDING OF THIS COURT THAT:

1) On February 22, 1974, in the Circuit Court of Alexander County, First Judicial Circuit, State of Illinois, the Respondent James Coleson in case No. 73-CF-22 was found guilty of two counts of perjury.

2) On February 22, 1974, the Presiding Judge in case No. 73-CF-22 ordered a presentence investigation of Respondent Coleson and informed Respondent Coleson and his attorney, Respondent Hogan, to cooperate in answering all pertinent and relevant questions of the Probation Officer of Alexander County.

3) On February 22, 1974, the Presiding Judge stated to Respondents Hogan and Coleson that to not answer certain questions propounded by the Probation Officer would interfere with the judicial processes in criminal proceedings by preventing the Presiding Judge from being fully informed about the offenses, the Respondent Coleson's motivations and his attitude.

4) On March 20, 1974, the Probation Officer filed a presentence report in case No. 73-CF-22, which report and transcript of March 25, 1974, in case No. 73-CF-22, which report and transcript are hereby made a part of and incorporated in this order, reveal that at the time of the presentence interview, Respondent Hogan was present with Respondent Coleson and upon the advice of Respondent Hogan, Respondent Coleson refused to answer relevant questions and prevented the Probation Officer from making a complete evaluation and recommendation of the Presiding Judge for purposes of sentencing.

5) On March 25, 1974, questions were propounded in open court to Respondent Coleson relative to inquiries that the Court determined to be relevant in sentencing, which questions Respondent Coleson refused to answer.

6) On March 25, 1974, the Presiding Judge set April 1, 1974, as a date for subsequent interview of Respondent Coleson with the Court's Probation Officer, and again ordered Respondent Coleson to respond to all questions propounded of him, and ordered Respondent Hogan to cease and desist from interfering with the judicial processes. The Presiding Judge further admonished and instructed Respondent Hogan to not interfere with Respondent Coleson's conversations with the Court's Probation Officer and further that if he persisted in his advice of telling Respondent Coleson not to answer questions of the Probation Officer, the Court would consider ordering a show-cause order on him to show cause why he should not be cited for contempt of court. The Presiding Judge further stated that he was granting full and complete immunity from any and all prosecution to Respondent Coleson on any charge growing our of any matter on which Respondent Coleson informs the Court's Probation Officer, and the Court further instructed Respondent Coleson to appear at the office of the Court's Probation Officer and answer any and all questions that were propounded of him, keeping in mind that he had been granted full and complete immunity from any further prosecution on any matters that he may divulge to the Court's Probation Officer. The Court further advised Respondent Coleson that if he failed to do so the Court would consider citing him for contempt of court.

7) On April 1, 1974, Respondent Coleson, with his attorney, Respondent Hogan, present did not answer relevant questions and did not cooperate with the Court's Probation Officer, and instead responded to certain relevant questions by invoking the First, Fifth and Sixth Amendments of the Constitution.

8) The Supplemental Presentence Report filed April 8, 1974, and the transcripts of the recorded interview of April 1, 1974, which are hereby made a part of and incorporated in this order, reveal a violation of the Presiding Judge's orders and warnings given both to Respondent Coleson and Respondent Hogan on February 22, 1974, and on March 25, 1974.

9) On March 18, 1974, pending sentencing of Respondent Coleson in case No. 73-CF-22 and prior to filing presentencing

report by the Probation Officer, Respondent Coleson, by his attorney, Respondent Hogan, filed a civil action, case No. 74-MR-7, in the Circuit Court of Alexander County against the Presiding Judge in case No. 73-CF-22 and other defendants therein named for damages growing out of the Court's discretionary rulings as Presiding Judge in case No. 73-CF-22.

10) The civil action as set out in the complaint in case No. 74-MR-7 has no basis in law or in fact so as to constitute a cause of action for damages or other relief against the Presiding Judge in case No. 73-CF-22.

11) The actions as herein above set forth by the Respondents, Dennis Hogan and James Coleson, interfered with the judicial processes of the court in case No. 73-CF-22 and prevented a full, complete and accurate presentencing investigation and report as required by Article Three of the Unified Code of Corrections, Ill. Rev. Stat. 1973, Ch. 38, Sec. 1005-3-1 through Sec. 1005-3-4, and prevented a full presentence report as to information about the offenses in case No. 73-CF-22 and the circumstances of the commission of the offenses, the defendant's version of the offenses, his motivations, and how the sentence fits into his pattern of life, and prevented a complete presentence report from being prepared and used by the Probation Officer, Presiding Judge, Appellate Courts, parole officers and others that may subsequently deal with or attempt to rehabilitate Respondent Coleson. It is noted throughout the transcripts that the Respondent Coleson did not assert a non-guilty plea after the finding of guilty in case No. 73-CF-22, but rather followed an affirmative action of pleading the First, Fifth and Sixth Amendments of the Constitution.

12) Article Three of the United States Code of Corrections, Ill. Rev. Stat. 1973, Ch. 38, Sec. 1005-3-4, limits the disclosure and use of a presentence investigation and report and any information ordered by a judge pursuant to Article Three of the Unified Code of Corrections, Ill. Rev. Stat. 1973, Ch. 38, Sec. 1005-3-1 through Sec. 1005-3-4, and necessary for sentencing

pursuant to Article Four and Article Six of the Unified Code of Corrections, Ill. Rev. Stat. 1973, Ch. 38, Sec. 1005-4-1 through Sec. 1005-4-2 and Sec. 1005-6-1 through Sec. 1005-6-4, does not violate the Fifth Amendment of the United States Constitution or violate Article 1, Sec. 10 of the Illinois Constitution, and any such information obtained pursuant to the request of a judge for purposes of sentencing is not voluntarily provided by a defendant.

13) Pursuant to Article Four of the Unified Code of Corrections, Ill. Rev. Stat. 1973, Ch. 38, Sec. 1005-4-1, the Presiding Judge in case No. 73-CF-22 was required to impose the sentence and the civil cause of action in case No. 74-MR-7 was not barred by any statute of limitations or otherwise required by any case law, state or federal, and may have been filed by the Respondent Coleson by his attorney, Respondent Hogan, after the Presiding Judge had passed sentence in the criminal proceeding so as not to delay, hinder or impede the administration of criminal justice, nor cause the Presiding Judge to be embarrassed.

14) The civil complaint in case No. 74-MR-7 was not filed by the Respondents in good faith to obtain the relief prayed for but so as to hinder, delay, or impede the administration of criminal justice, and to interfere with the Judicial Processes and embarrass the court so as to lessen the Court's dignity and authority.

IT IS THE FURTHER FINDING OF THIS COURT THAT:

Contempt of court was committed by Respondent James Coleson and by his attorney, Respondent Dennis Hogan, individually and as an attorney and officer of the court, and that Respondent James Coleson and Respondent Dennis Hogan did hinder and obstruct the Presiding Judge in case No. 73-CF-22 in the administration of criminal justice, and did interfere with the judicial processes and did violate orders of that court so as to lessen the court's authority and dignity, as set forth in the

documents and transcripts in case No. 73-CF-22 and case No. 74-MR-7, which documents and transcripts are hereby made a part of and incorporated in this order.

IT IS THEREFORE ORDERED AND ADJUDGED:

1. That the conduct and actions of Respondent Dennis Hogan as set forth in Count I of the Rule to Show Cause was contemptuous, that the conduct and actions of Respondent Dennis Hogan as set forth in Count I of the Rule to Show Cause was contemptuous, and that the conduct and actions of Respondent Dennis Hogan as set forth in Count III of the Rule to Show Cause was contemptuous.

2. That the Respondent Dennis Hogan pay a fine of $750.00 for his contemptuous conduct as set forth in Count I of the Rule to Show Cause, that the Respondent Dennis Hogan pay a fine of $750.00 for his contemptuous conduct as set forth in Count II of the Rule to Show Cause, and that the Respondent Dennis Hogan pay a fine of $750.00 for his contemptuous conduct as set forth in Count III of the Rule to Show Cause, said fines to be paid to the Circuit Clerk of Alexander County.

3. That the Respondent Dennis Hogan shall be incarcerated in the County Jail of Alexander County for a period of thirty (30) days for his contemptuous conduct as set forth in Count I of the Rule to Show Cause, that the Respondent Dennis Hogan shall be incarcerated in the County Jail of Alexander County for a period of thirty (30) days for his contemptuous conduct as set forth in Count II of the Rule to Show Cause, and that the Respondent Dennis Hogan shall be incarcerated in the County Jail of Alexander County for a period of thirty (30) days for his contemptuous conduct as set forth in Count III of the Rule to Show Cause, said three periods of thirty (30) days to run concurrently.

4. That the conduct and actions of Respondent James Coleson as set forth in Count I of the Rule to Show Cause was contemptuous, that the conduct and actions of Respondent

James Coleson as set forth in Count II of the Rule to Show Cause was contemptuous, and that the conduct and actions of Respondent Coleson as set forth in Count III of the Rule to Show Cause was contemptuous.

5. That the Respondent James Coleson pay a fine of $100.00 for his contemptuous conduct as set forth in Count I of the Rule to Show Cause, that the Respondent James Coleson pay a fine of $100.00 for his contemptuous conduct as set forth in Count II of the Rule to Show Cause, and that the Respondent James Coleson pay a fine of $100.00 for his contemptuous conduct as set forth in Count III of the Rule to Show Cause, said fines to be paid to the Circuit Clerk of Alexander County.

6. That the contempt sentences as herein above set forth shall become effective for both Respondents Dennis Hogan and James Coleson forty-two (42) days from the filing of this Order with the Clerk of the Circuit Court of Alexander County.

7. That this Order and all matters it encompasses as concerns Respondent Dennis Hogan be referred for proper disciplinary proceedings affecting members of the Illinois Bar.

APPENDIX B.

APPELLATE COURT OF ILLINOIS,
Fifth District.

April 19, 1976.

PEOPLE EX REL. PEYTON H. KUNCE, CIRCUIT JUDGE,
Petitioner-Appellee,

vs.

DENNIS HOGAN ET AL.,
Respondents-Appellants.

No. 74-313.

OPINION OF THE APPELLATE COURT OF ILLINOIS.

GEORGE J. MORAN, *Justice.*

This is an appeal from an order of the circuit court of Alexander County finding appellants, a criminal defendant and his lawyer, in contempt of court. Appellants were each prosecuted on three counts of a rule to show cause, charging that their refusal to cooperate fully with the preparation of a presentence report and their filing of a civil action against the presiding judge were contemptuous.

By jury verdict, appellant James Coleson was found guilty of two counts of perjury for falsification of an application for welfare benefits. Coleson, represented by appellant Dennis Hogan, did not testify at trial. The trial judge ordered a presentence investigation of Coleson, and ordered Coleson and Hogan to cooperate fully with the probation officer conducting the investigation. After post-trial motions were filed by Hogan on Coleson's behalf, but prior to sentencing, appellants filed a civil suit against three judges of the circuit court and the state's

attorney of Alexander County for damages arising out of bail practices in the criminal proceedings against Coleson.

At an interview with the probation officer, Coleson provided certain background information, but on the advice of Hogan, refused to answer questions material to the perjury offense, asserting instead his rights under the first, fifth and sixth amendments to the United States Constitution. After a hearing on the post-trial motions, the trial judge was informed of appellants' actions at the interview. He then ordered a second interview, ordered Coleson to respond to all questions asked by the officer, ordered Hogan not to interfere, and warned both appellants of possible contempt citations. The trial judge further stated that he was granting full and complete immunity to Coleson for all information given to the probation officer. A second interview was held and again, on Hogan's advice, Coleson refused to answer certain questions and refused to take a literacy test. Sentence for the perjury convictions was thereafter imposed by the trial judge.

A few days prior to sentencing, the trial judge filed a rule to show cause charging appellants with contempt. Count I of the rule related to appellants' actions with respect to the presentence investigation, Counts II and III related to the civil action in which the trial judge was named a defendant. Because of the action pending against him, the trial judge excused himself and another judge, who will hereafter be referred to as the "presiding judge", presided over the contempt proceedings. Appellants were adjudged in contempt of court on all three counts. Hogan was fined $750 for each of the three counts, sentenced to three concurrent thirty-day jail terms, and referred for possible disciplinary action to the Attorneys Registration Commission. Coleson was fined $100 for each count.

Under the statutes of the State of Illinois a sentencing court is required to order a presentence report for any defendant convicted of a felony, unless waived by the defendant. Ill. Rev. Stat., 1973, ch. 38, par. 1005-3-1. The purpose of the pre-

sentence report is to provide the court with information about the defendant so that sentence may be imposed, with the court being able to take into account not only the nature and circumstances of the offense but also the history and character of the defendant, his mental and physical condition, and his social situation. Ill. Rev. Stat. 1973, ch. 38, par. 1005-3-2. In the instant case, defendant Coleson chose to take advantage of his right to have the court impose an informed sentence, but without discussing certain matters with the investigating officer. Putting aside for a moment the validity of Coleson's asserted privilege against self-incrimination, we are faced with the issue of the power of a sentencing court to order a defendant who does not waive the presentence report to communicate with an investigating probation officer. Does a defendant's failure to waive the report amount to a waiver of any and all objections, legal or personal, that he may have to disclosing certain information?

There exists in this country a right to testimony, based in part on the Sixth Amendment's right to confrontation and the right to subpoena witnesses, which has been characterized as necessary to the functioning of the courts and to the preservation of an orderly society. *Blair* v. *U. S.*, 250 U. S. 273, 281, 39 S. Ct. 468, 471, 63 L. Ed. 979 (1919); Lilienthal, *The Power of Government Agencies to Compel Testimony*, 39 Harv. L. Rev. 694 (1926). Based on one party's right to testimony is the concomitant duty in another party to testify. And to effectuate the right to testimony, thus, to enforce the duty to testify, there exists the power to compel testimony. Without a right to testimony, or some governmental necessity, there can be no power to compel. Recognizing the burden of enforcing the duty to testify, Justice Homes stated, "[T]he power to require testimony is limited, as it usually is in English-speaking countries, at least, to the only cases where the sacrifice of privacy is necessary . . .." *Harriman* v. *ICC*, 211 U. S. 407, 419-20, 29 S. Ct. 115, 118, 53 L. Ed. 253 (1908). And in order that the

proper balance may be struck between the necessity for testimony and the policy of non-interference, the power to compel is possessed primarily by the judiciary. Lilienthal, *supra* at 695; *Wigmore*, Evidence § 2195. Therefore, the power to compel testimony before an inferior judicial officer, such as the probation officer in this case, depends upon the existence of the power in superior court. Wigmore, *supra*.

In the instant case the validity of the trial judge's order that defendant Coleson communicate with the probation officer depends upon the court's right to the information sought. We can conceive of no basis for such a right.[1] To the contrary, a defendant has the right to waive the entire presentence report. Ill. Rev. Stat., 1973, ch. 38, par. 1005-3-1. We do not believe that the lack of such a waiver magically creates a right in the court to probe the mind of the defendant or a governmental necessity for his testimony. Courts in other jurisdictions have stated that interrogation of a defendant by a sentencing court is improper after a verdict of guilty has been rendered by a jury. *E. g.*, *Heyward* v. *State*, 161 Md. 685, 158 A. 897, 900-901 (1932).

Furthermore, the Supreme Court has held that at the sentencing stage a defendant still possesses basic due process rights. *Mempa* v. *Rhay*, 389 U. S. 128, 88 S. Ct. 254, 19 L. Ed. 2d 336 (1967). It is our conclusion that a defendant facing sentencing by an Illinois court has the right to be free from the burden of the duty to testify, unless there exists an overriding governmental necessity, or a right to his testimony, neither of which are present in this case.

Then too, it is clear that the defendant's refusal to answer questions was justified under the Fifth Amendment privilege against self-incrimination. At the time of Coleson's refusal to testify he had been adjudged guilty by a jury of the offense

1. We are not dealing with the question of a defendant's right to information in the possession of a third person who is interviewed by a probation officer in the preparation of a presentence report.

of perjury. The lower court apparently believed that as a result of the guilty verdict, Coleson's Fifth Amendment privilege ceased. It is true that the removal of the possibility of incrimination, including a final adjudication of guilty, does eliminate the privilege. *Reina* v. *U. S.*, 364 U. S. 507, 81 S. Ct. 260, 5 L. Ed. 2d 249 (1960). But "[t]he conviction here was not final in several aspects. Sentence has not been imposed." *People* v. *Hartley*, 22 Ill. App. 3d 108, 317 N. E. 2d 57 (1974). In *Hartley* the court held, with ample authority, that where a defendant had not been sentenced, post-trial motions were pending and the time for appeal had not expired, the jury verdict was not a final conviction such as to extinguish the defendant's Fifth Amendment privilege. A defendant is entitled to full protection from the effects of his testimony. *Halpin* v. *Scotti*, 415 Ill. 104, 108, 112 N. E. 2d 91 (1953). *Reina, supra,* is clearly distinguishable from *Hartley* and the case at bar in that the contemnor in *Reina* was already serving a sentence and there is no indication in that case that any post-conviction remedies were being pursued.

A proper grant of immunity from the use of incriminating testimony can operate to extinguish a witness's privilege against self-incrimination, and can be the basis for a valid order compelling his testimony. *Kastigar* v. *U. S.*, 406 U. S. 441, 92 S. Ct. 1653, 32 L. Ed. 2d 212 (1972). The statutes of this state provide a procedure where under certain specified circumstances immunity can be granted to a witness and the witness compelled to testify. Ill. Rev. Stat. 1973, ch. 38, par. 106-3. Assuming, *arguendo*, that the presentence investigation is part of a trial, the immunity statute was not complied with in two important respects. First, the trial judge granted immunity to Coleson on its own motion rather than on motion of the state, and secondly, Coleson was the defendant, not a material witness. A grant of immunity under statutory authority must be in strict compliance with the terms of the statute. *People* v. *Rockola*, 339 Ill. 474, 171 N. E. 559 (1930). In *Rockola* the Supreme Court reversed

a contempt adjudication which was based on a refusal to testify after an invalid grant of immunity. The statute in that case empowered the court to grant immunity in investigations or trials for certain specified offenses, including the crime of bribery. The grant of immunity was held invalid in *Rockola* because the offense charged in the trial was conspiracy to commit bribery, not the offense itself.

Having decided that the immunity granted by the trial judge was not within his statutory authority, there remains the question of a court's inherent power to grant immunity. The courts of this state have no such power. *People* v. *English*, 31 Ill. 2d 301, 201 N. E. 2d 455 (1964). The removal of the privilege against self-incrimination by a grant of immunity may only be accomplished by the legislature. *Apodaca* v. *Viramontes*, 53 N. M. 513, 212 P. 2d 425, 13 A. L. R. 2d 1427; *English, supra.* In the words of Judge Cardozo:

> "The grant of an immunity is in very truth the assumption of a legislative power . . .. It is the assumption of a power as to annul as to individuals or classes the statutory law of crimes, to stem the course of justice, to absolve the grand jurors of the county from the performance of their duties, and the prosecuting officer from his." *Doyle* v. *Hofstader*, 257 N. Y. 244, 177 N. E. 489, 495 (1931).

Aside from the legal invalidity of the trial judge's grant of immunity, the protection granted was wholly inadequate to protect the defendant against the effects of his statements. A grant of immunity, to be valid, must be co-extensive with the Fifth Amendment privilege it purports to remove. *Counselman* v. *Hitchcock*, 142 U. S. 547, 12 S. Ct. 195, 35 L. Ed. 1110 (1892); *Kastigar* v. *U. S., supra.* In this case the grant of immunity did not protect Coleson from the imposition of a harsher sentence as the result of his testimony, nor is it clear that the information obtained would not be used against him in the event of a retrial.

Another ground on which the lower court seems to have based its judgment are the disclosure limitations imposed upon

information obtained in the presentence investigation. Such information may be provided to the sentencing judge, the prosecutor, officials of a penal institution, and anyone else "as ordered by the court." Ill. Rev. Stat., 1973, ch. 38, par. 1005-3-4. We do not comprehend, and the state gives us no legal or logical suggestion, how limited disclosure could serve to remove the privilege against self-incrimination.

The fact the court ordered Coleson to communicate with the probation officer after overruling the Fifth Amendment plea, does not affect the outcome of this case. As the state contends, all orders and judgments of courts must be complied with promptly, even if believed incorrect. *U. S.* v. *United Mine Workers,* 330 U. S. 258, 67 S. Ct. 677, 91 L. Ed. 884 (1946). But that general rule does not apply where the order is to reveal information which is asserted to be self-incriminating. *Maness* v. *Meyers,* 419 U. S. 449, 95 S. Ct. 584, 594, 42 L. Ed. 2d 574 (1975). The situation is different in that instance because of the possibility of irreparable injury from compliance. Thus, in the area of the Fifth Amendment, precompliance review may properly be sought, and if the privilege is later held to prevail, the violation of the order no longer supports a contempt citation. *Maness* v. *Meyers, supra.*

The final ground on which Coleson's privilege could have been extinguished is that the information obtained by the probation officer would not have been voluntarily provided, and thus subject to subsequent suppression.

In the words of Chief Justice Burger:

> "There the 'cat' was not yet 'out of the bag' and reliance upon a later objection or motion to suppress would 'let the cat out' with no assurance whatever of putting it back." *Maness* v. *Meyers,* 95 S. Ct. at 593.

See also *Ellis* v. *U. S.,* 135 U. S. App. D. C. 35, 416 F. 2d 791, 796 (1969). We cannot hold that a court may lawfully compel testimony because the compulsion would be the basis

for a subsequent exclusion. Such circular reasoning would destroy the very protection which is guaranteed by the Fifth Amendment.

The final issue with which we are faced is whether a lawyer can be held in contempt of court for offering good faith advice to his client to disobey a court order. Since we hold that the advice given was correct, the judgment against Hogan must be reversed along with the judgment against Coleson. But we feel an obligation to go further than to base our decision as to Attorney Hogan on that alone. It is extremely important that we express clearly and unequivocally that the contempt adjudication against Hogan would be reversed even if his advice were incorrect.

As a general rule, orders of courts must be complied with until reversed on appeal. *U. S.* v. *United Mine Workers,* 330 U. S. 258, 67 S. Ct. 677, 91 L. Ed. 884 (1947). Moreover, it is improper, and in certain circumstances contemptuous, for an attorney to advise a client to disobey a court order. *Maness* v. *Meyers,* 419 U. S. 449, 95 S. Ct. 584, 591, 42 L. Ed. 2d 574 (1975). "When a court . . . orders a witness to reveal information, however, a different situation may be presented." *Maness* v. *Meyers,* 95 S. Ct. at 592. The procedure counseled in this case was the ordinary and proper course for achieving precompliance review of a Fifth Amendment claim. *Maness* v. *Meyers,* 95 S. Ct. at 593. We regard *Maness* as controlling on this issue, for the Supreme Court held that an attorney may not be penalized for good faith advice to disobey a court order on the ground of the Fifth Amendment privilege against self-incrimination. *Maness* v. *Meyers,* 95 S. Ct. at 594-95.

The right to assistance of counsel in a criminal case is guaranteed by the Sixth Amendment to the United States Constitution and by Article I, section 8 of the Illinois Constitution. Any restriction on the rights of a lawyer to give advice seriously impairs the constitutional right of a client to receive that advice,

and denies the client due process of law. *Powell* v. *Alabama*, 287 U. S. 45, 60, 69, 53 S. Ct. 55, 61, 64, 77 L. Ed. 158 (1932). Contempt adjudications like the one below serve to chill the effective and unfettered representation which attorneys are bound to provide their clients. We would not hesitate to reverse the contempt adjudication of an attorney for offering a client good faith, albeit incorrect, advice to disobey an order for the disclosure of information, on the ground of the privilege against self-incrimination.

Appellants also contend that the evidence introduced at trial was not sufficient to support a finding of contempt under Counts II and III of the rule to show cause. The trial judge alleged in Count II that because the civil complaint filed by the appellants against the circuit court and three of its judges, which was based on the theory that the circuit court had required Coleson to post excessive bail in the criminal proceeding, could have been filed after the sentencing of Coleson in the criminal proceeding, the filing of the complaint before the sentencing obstructed justice and was thus in contempt of the circuit court. The trial judge alleged in Count III that because the complaint had no basis in fact or law, and because the complaint was not filed in good faith, but for the purpose of embarrassing the circuit court, the filing of the complaint was contemptuous.

Prior to Coleson's indictment, substantial controversy had existed concerning bail procedures in Alexander County. This controversy had resulted in the filing of civil litigation in the United States District Court against some of the judges and other officials of Alexander County. The Court of Appeals for the Seventh Circuit ruled that a cause of action had been stated in the litigation. *Littleton* v. *Berbling*, 468 F. 2d 389. On review, the United States Supreme Court reversed, holding that the plaintiffs lacked standing in that most of them had never been charged with an offense. As to those plaintiffs who had been prosecuted in the past, the Supreme Court held that they lacked standing to complain because their prosecutions had

terminated with the filing of suit. *O'Shea* v. *Littleton*, 414 U. S. 488, 94 S. Ct. 669, 38 L. Ed. 2d 674, 683 (1974); *Spomer* v. *Littleton*, 414 U. S. 514, 94 S. Ct. 685, 38 L. Ed. 2d 694 (1974).

Hogan claimed that prior to the time of Coleson's sentencing, bail practices similar to those attacked in the *O'Shea* and *Spomer* litigation still existed. Essentially, Coleson alleged that he had been denied assistance of counsel at his bail hearing, had been placed under a $1000 bond, and had been denied the opportunity to show his entitlement to release on his own recognizance. It was Hogan's stipulated testimony in the contempt hearing that after reading the United States Supreme Court cases of *O'Shea* v. *Littleton, supra,* and *Spomer* v. *Littleton, supra,* he concluded that a plaintiff in a civil action challenging bail practices would lose standing to litigate once he was sentenced and his bail deposit returned.

With reference to Counts II and III of the contempt citation, the presiding judge did not find that the complaint was contemptuous in and of itself because of the language used, but rather that it was totally lacking in merit; that it could have been filed after sentencing rather than before and therefore it was filed solely for the purpose of obstructing justice. The only evidence introduced to sustain the charges was a transcript of the criminal proceedings, the complaint in the civil proceeding and the verified rule to show cause filed by the trial judge. At the hearing before the presiding judge, the state agreed that the only evidence it had to prove that the complaint was not filed in good faith, but rather was filed to "disrupt or embarrass the court," was the verified rule to show cause.

However, because the appellants were not charged with committing a direct criminal contempt in the physical presence of the judge, the trial judge's verified rule to show cause was not evidence against the appellants. See *In re Oliver*, 333 U. S. 257, 68 S. Ct. 499, 92 L. Ed. 682; *People* v. *Skar*, 30 Ill. 2d 491, 198 N. E. 2d 101. Therefore, if we are to sustain the trial

court's order, we must do so solely on the basis that the filing of the complaint prior to sentencing was filed with the intent to obstruct justice. We point out that contempt may be committed by incorporating impertinent, scandalous, insulting or contemptuous language reflecting on the integrity of the court in pleadings, motions and notice of motions. *People* v. *Sherwin*, 334 Ill. 609, 166 N. E. 513; *People* v. *Richardson*, 397 Ill. 84, 72 N. E. 2d 851. However, we further observe the trial court's order did not find that there was any such language in the complaint. The trial court's order must be sustained upon the ground on which it was imposed or not at all. *People* v. *Miller*, 51 Ill. 2d 76, 281 N. E. 2d 292.

We are therefore not faced with a situation where language contained in the complaint is sufficient to furnish an evidentiary basis for a contempt conviction, but rather a situation where the state must prove beyond a reasonable doubt by extrinsic evidence that the defendant filed the complaint with intent to obstruct justice. The record reflects that the state introduced no evidence whatsoever in support of these charges other than the verified contempt citation.

This case was tried on the theory that it was an indirect contempt. In our opinion, the charges made against the defendant were not of indirect contempt, but rather of direct contempt committed in a constituent part of the court outside the presence of the judge.

There are two classes of direct contempt. One consists of acts that are performed in the physical presence of a judge, so that the judge sees and hears for himself all the elements of misconduct which are later charged against the defendant as having been contemptuous. The other category of direct contempt includes conduct which occurs before a constituent part of a court, but not in the physical presence of a judge. *In re Oliver, supra; People* v. *Jashunsky*, 51 Ill. 2d 220, 224, 282 N. E. 2d 1, 3; *People* v. *Skar, supra.* Contemptuous conduct that falls within the first category may be punished summarily by the

judge. *In re Oliver, supra; People* v. *Skar, supra.* Allegedly contemptuous behavior which falls within the second category of direct criminal contempt must be established by extrinsic evidence at a fair and impartial hearing. *In re Oliver, supra; People* v. *Skar, supra.* When a contempt of this kind is charged against a defendant, the state must prove beyond a reasonable doubt that the defendant committed the contempt. *People* v. *Skar, supra; People ex rel. Chicago Bar Association* v. *Barasch*, 21 Ill. 2d 407, 412, 173 N. E. 2d 417, 420; *City of Chicago* v. *Hart Building Corp.*, 116 Ill. App. 2d 39, 253 N. E. 2d 496.

The filing of documents with a court is behavior which occurs in the constructive presence of the court and is therefore a direct contempt of the second category if either the documents or the act of filing is regarded as contemptuous. *People* v. *Jashunsky, supra; In re Estate of Kelly*, 365 Ill. 174, 6 N. E. 2d 113; *People* v. *Andalman*, 346 Ill. 149, 178 N. E. 412. Thus the charges against the appellants under Counts II and III of the rule to show cause, which were based on the filing of the complaint with the circuit court, should have been for a direct contempt of the second category instead of for an indirect contempt. The proof necessary to establish the contempt charges, however, is the same regardless of whether the charges are considered to be for an indirect contempt or a direct contempt of the second category, because extrinsic evidence is necessary to substantiate the charges under either theory.

The proceeding against the appellants on the contempt charges was criminal, rather than civil, proceeding because the object of the proceeding was to punish the appellants. *American Cyanamid Co.* v. *Rogers*, 21 Ill. App. 3d 152, 314 N. E. 2d 679; *Eastman* v. *Dole*, 213 Ill. App. 364.

A criminal contempt is a crime in every fundamental respect. *Bloom* v. *Illinois*, 391 U. S. 194, at 201, 88 S. Ct. 1477, 20 L. Ed. 2d 522 rev'g 35 Ill. 2d 255, 220 N. E. 2d 475. Because a criminal contempt is a crime, it consists of the two basic parts of a criminal offense; that is, a mens rea and an actus reus.

The mens rea required for criminal contempt is an intent "to embarrass, hinder, or obstruct a court in its administration of justice, or to derogate from its authority or dignity, or bring the administration of law into disrepute." *In re Estate of Melody,* 42 Ill. 2d 451, 248 N. E. 2d 104; see also *United States* v. *Seale,* 7 Cir., 461 F. 2d 345. The actus reus of a criminal contempt is an act which does embarrass, hinder, or obstruct a court in the administration of justice. *In re Estate of Melody, supra;* see also *United States ex rel. Robson* v. *Oliver,* 7 Cir., 470 F. 2d 10.

In order to sustain the trial court's order entered pursuant to Counts II and III of the rule to show cause, the state had to prove beyond a reasonable doubt that the appellants filed the civil complaint with the intent "to embarrass, hinder, or obstruct" the circuit court in the administration of justice. Since there is no valid evidence to support the trial court's finding, the order of the trial court finding the defendants guilty on Counts II and III of the citation must also be reversed.

For the foregoing reasons the judgment of the circuit court of Alexander County finding the defendants guilty of contempt of court is reversed.

Judgment reversed.

CARTER, *J.*, concurs.

JONES, *Justice* (dissenting).

In their zeal to assure the full protection of the constitutional right to the representation of counsel the majority has glossed over and disregarded a case of true, glaring and flagrant contempt of court.

I have no quarrel with the reversal of the contempt finding as to Mr. Coleson on any count or as to attorney Hogan with regard to Count I. However, I disagree with the majority's reversal of the finding of contempt by attorney Hogan under Counts II and III and I accordingly respectfully dissent.

The majority opinion reverses the conviction of attorney Hogan as to Counts II and III because of their finding that there was no evidence that attorney Hogan filed the civil complaint for damages against Judge Kunce with an "intent to obstruct justice." The majority premise their discussion of attorney Hogan's contempt under Counts II and III of the citation with the statement that: "* * * the State must prove beyond a reasonable doubt by extrinsic evidence that the defendant filed the complaint with intent to obstruct justice." This is not the applicable standard in Illinois and is a misstatement of the law. Although they refused to apply the rule to attorney Hogan under Counts II and III the majority properly stated earlier in their opinion that contempt of court is generally defined as conduct calculated to embarrass or obstruct a court in its administration of justice or to derogate from its authority or dignity, or bring the administration of law into disrepute. (*People* v. *Jashunsky,* 51 Ill. 2d 220, 282 N. E. 2d 1; *In re Melody's Estate,* 42 Ill. 2d 451, 248 N. E. 2d 104.) The majority opinion ignores a consideration of the acts of attorney Hogan with regard to this standard and applies instead a rule they presumably have taken from *United States* v. *Seale,* 461 F. 2d 345. In the *Seale* case the court discussed whether the acts of the respondent there came within the ambit of a *federal statute* dealing with contempt. The statute is 18 U. S. C., sec. 401(1) and it provides that a district judge has power to summarily punish "[m]isbehavior of any

person in its presence or so near as to obstruct the administration of justice." The federal statute lists four requirements to support a contempt conviction: (1) the conduct must constitute misbehavior; (2) the misbehavior must rise to the level of an obstruction to the administration of justice; (3) the conduct in question must be in the court's presence or so proximate that it obstructs the administration of justice, and (4) there must be an intent to obstruct.

It thus appears that the majority has lifted their requirement for a finding of contempt from the second and fourth elements of contempt under the federal statute. Such criteria are without precedent in Illinois and inject an entirely new standard for determining whether contempt of court has been committed.

Developing the improper standard for establishing contempt, the majority state that there are two basic parts to criminal contempt, "a *mens rea* and an *actus reus*." They cite *Estate of Melody, Seale,* and *U. S. ex rel. Robson* v. *Oliver,* 7 Cir., 470 F. 2d 10, as authority for their description of the *"mens rea"* and *"actus reus"* required for a contempt finding. The cases cited neither discuss nor make any reference to a *"mens rea"* or *"actus reus"* aspect of contempt.

Even if the criteria of the federal statute governed here, the majority disregarded the general rule for finding intent. The Illinois rule is that intent is a state of mind, and, if not admitted, can be shown by surrounding circumstances. (*People* v. *Koshiol,* 45 Ill. 2d 573, 262 N. E. 2d 446.) Intent must ordinarily be proved circumstantially, by inferences drawn from conduct appraised in its factual environment. (*People* v. *Johnson,* 28 Ill. 2d 441, 192 N. E. 2d 864.) And under the federal statute the rule for determining whether the requisite intent exists is similar to that in Illinois as shown by the following from the *Seale* case:

> "The minimum requisite intent is better defined as a volitional act done by one who knows or should reasonably be aware that his conduct is wrongful. [citations] Of course, an actual design to subvert the administration of justice is a more grievous and perhaps more culpable state of mind, but proof of such an evil motive is unnecessary to establish the required intent. [citation]
>
> Certainly the most obvious source from which this intent can be ascertained is the trial transcript. [citations] Indeed, some conduct depicted therein will itself carry sufficient indicia of intent to satisfy the Government's burden of proof on this issue." 461 F. 2d at 368-369.

The Rule to Show Cause which Judge Kunce filed asserted that the complaint for civil damages filed by attorney Hogan on behalf of Coleson was not filed in good faith to obtain the relief prayed for, but so as to hinder, delay or impede the administration of criminal justice and to interfere with judicial processes and embarrass the court so as to lessen the court's dignity and authority.

I believe the assertions of the Rule were well founded in law and established in fact and that attorney Hogan was properly found guilty of contempt and the judgment of the trial court should be affirmed.

The contemptuous act of attorney Hogan was his serving as attorney for Coleson in the filing of a civil suit for damages against Judge Kunce before whom Coleson was being prosecuted for the crime of perjury, while that criminal case was still pending. Such action is without question a direct attack upon the integrity of the court. The act speaks for itself and was obviously calculated to embarrass, hinder and obstruct the court in its administration of justice and did derogate from its authority and dignity and bring the administration of law into disrepute.

The majority assert in their opinion that the State introduced "no evidence whatsoever" in support of the charges other than the verified contempt citation. But that is not true. The record shows that the civil complaint for damages against Judge Kunce was attached to and incorporated in the Rule to Show Cause that contained the charges of contempt made against attorney Hogan, and that this complaint was admitted into evidence by stipulation of the parties. Moreover, throughout the contempt

hearing attorney Hogan, through his attorney, admitted the filing of the complaint against Judge Kunce while the criminal case against Coleson was pending. No further evidence of attorney Hogan's contempt was required.

In this case written specifications of the acts constituting the contempt were filed (the Rule to Show Cause), respondent Hogan was notified, and a hearing was held at when Hogan was present and represented by counsel. After filing the Rule to Show Cause Judge Kunce properly recused himself from the case and it was assigned to another judge who conducted the hearing. Thus, attorney Hogan was accorded due process of law in this proceeding. *People* v. *Skar*, 30 Ill. 2d 491, 198 N. E. 2d 101; *Mayberry* v. *Pennsylvania*, 400 U. S. 455, 91 S. Ct. 499, 27 L. Ed. 2d 532; *United States* v. *Seale*.

Admittedly the language used in the complaint for civil damages was not per se contemptuous—but that is not the nexus of the contemptuous act. We are not concerned here with the rule which holds that the mere filing with the clerk of the court any document containing contemptuous matter is sufficient to constitute direct contempt as in *In re Kelly's Estate*, 365 Ill. 174, 6 N. E. 2d 113.

The civil suit for damages which attorney Hogan filed on behalf of Coleson arose out of alleged grievances over the fixing of bail bond in the case of Coleson's prosecution. But Judge Kunce did not fix any bond and had no part in fixing any bond; neither did he consider any motion nor make any ruling regarding Coleson's bond. This is reflected in the civil suit for damages filed against Judge Kunce by attorney Hogan on behalf of Coleson. That suit named the State's Attorney of Alexander County, two other judges in addition to Judge Kunce (who was named "individually, as tort feasor, and, as judge of the First Judicial Circuit Court of Illinois") and the circuit clerk of Alexander County. Paragraphs 6, 7 and 8 of that complaint contained the only reference to Judge Kunce and they were as follows:

"6. That on June 28, 1973, at arraignment, the Hon. Peyton Kunce, acting without sufficient legal authority with knowledge of the state of the record in 73-CF-11 and 73-CF-22, and, in excess of his authority as Judge purported to exercise the administrative authority of the Illinois Supreme Court to effect an administrative flowing together of cases 73-CF-11 and 73-CF-22, cases he knew to be substantially different as to subject matter and parties.

7. That at the time the Honorable Peyton Kunce purported, on June 28, 1973, to exercise the administrative authority aforesaid, the Honorable Roy O. Gulley, Administrator of the courts of the State of Illinois, either had not authorized the Honorable peyton Kunce to so act, or, if authorization was given to the Honorable Peyton Kunce it was invalid and without delegation or other basis in law.

8. That the purported exercise of administrative authority by the Hon. Peyton Kunce was also, at the instigation of the Hon. W. C. Spomer and was an aggravation of and a knowing continuation of the wrongful attachment and false imprisonment of the substantial portion of Plaintiff's person alleged in paragraph 2 above."

It is readily apparent from these allegations that attorney Hogan and Mr. Coleson could have litigated their bond issue without Judge Kunce as a party defendant since Kunce never took any part in the bond fixing process. The sole allegation against Judge Kunce was that he "purported to exercise the administrative authority of the Illinois Supreme Court to effect an administrative flowing together of cases 73-CF-11 and 73-CF-22 * * *." In short, Judge Kunce granted the State's motion to consolidate. For this, he was sued for damages in a civil case, while consolidated cases 73-CF-11 and 73-CF-22 were yet pending before him, for $100,000. The action of attorney Hogan in filing the civil complaint was a patent absurdity and he should be held accountable for his attack against the court. If Coleson was innocent of the perjury charge, if the court before who he appeared erred, even grievously so, if a miscarriage of justice had occurred, then plainly Coleson had his remedy in his right to appeal and attorney Hogan, repre-

senting Coleson, well knew this. Bringing a civil suit for damages against a judge because of his ruling in a pending case is not an available mode of relief for a litigant. While the judiciary may be subject to just critism for their rulings and behavior, they enjoy immunity from civil suits based upon their judicial actions. *Bradley* v. *Fisher*, 13 Wall. 335, 20 L. Ed. 646; *In re Mason*, 33 Ill. 2d 53, 210 N. E. 2d 203; *People ex rel. Chicago Bar Ass'n* v. *Standidge*, 333 Ill. 361, 164 N. E. 844.

We need not be concerned with whether attorney Hogan filed a complaint with intent to hinder, impede or embarrass the court, or to derrogate from its authority or dignity, or bring the administration of law into disrepute. It is well settled that whether a direct contempt has been established depends upon the action and not the alleged intention of the offending party. (*People* v. *Denson*, 59 Ill. 2d 546, 322 N. E. 2d 464; *Anderson* v. *Macek*, 350 Ill. 135, 182 N. E. 745; *Kneisel* v. *Ursus Motor Co.*, 316 Ill. 336, 147 N. E. 243.) The *Anderson* and *Kneisel* cases are particularly apt since they involved acts constituting a direct contempt occurring outside the presence of the court.

Courts should require that practicing attorney's have a higher regard for administration of justice than that which is required of laymen. (*In re Kelly's Estate.*) Attorney Hogan's conduct in the filing of this civil suit for damages is so flagrant and outrageous that no precise precedent can be found. Clearly the filing was not in good faith as to Judge Kunce since he had nothing to do with the bond in Coleson's case. The only conclusion which can be drawn from the flagrant misbehavior of attorney Hogan is that it was deliberately calculated to impede the orderly administration of justice. His conduct assailed the dignity and authority of the court, and it possessed the inherent power to punish him for contempt. I would affirm the finding of contempt against attorney Hogan under Counts II and III of the Rule to Show Cause.

APPENDIX C.

OPINION OF THE SUPREME COURT OF ILLINOIS.

Rendered June 1, 1977.

THE PEOPLE *ex rel.* PEYTON H. KUNCE, *Judge*, *Appellant*, v. DENNIS HOGAN *et al.*—(Dennis Hogan, Appellee.)

MR. JUSTICE RYAN delivered the opinion of the court:

This court granted leave to appeal from a decision of the appellate court in which one judge dissented. (37 Ill. App. 3d 673.) The appellate court reversed the circuit court of Alexander County, which held Dennis Hogan in contempt of court. The rule to show cause which had been filed contained three counts. The two counts which are the subject of this appeal charged that Hogan acted contemptuously when he, as a defense counsel in a criminal case, filed an action against the presiding judge in the criminal case after a verdict of guilty but prior to sentencing.

Hogan's client, James Coleson, had been tried and found guilty on two counts of perjury for falsification of applications for welfare benefits. The trial judge ordered a presentence investigation and directed Coleson and Hogan to cooperate with the probation officer conducting the investigation. On Hogan's advice, Coleson refused to answer certain questions.

Prior to the sentencing of Coleson, Hogan, on behalf of Coleson, file a civil damage suit for $100,000 against Judge Kunce, who was the trial judge in the criminal case, two other judges of the circuit court, and the State's Attorney of Alexander County. The thrust of the civil action concerned the setting of bail for Coleson in the criminal case. The only allegations against Judge Kunce, however, dealt instead with the

judge's action in consolidating the two actions against Coleson. Later, on the motion of the defendants in the civil case, the suit was dismissed by the trial court. The appellant court affirmed the dismissal. *Coleson* v. *Spomer* (1975), 31 Ill. App. 3d 563.

After the civil suit was filed, Judge Kunce entered a rule to show cause charging Hogan and Coleson with contempt. Count I dealt with their failure to cooperate in the presentence investigation. Counts II and III related to the filing of the civil action. Count II concerned the timing of the civil suit, alleging that the filing of the suit prior to sentencing was contemptuous in that it tended to "delay, hinder or impede the administration of cimінal justice" or to "cause the court to be embarrassed or * * * prejudiced." Count III charged that the filing of the suit was contemptuous regardless of its timing because its purpose was to embarrass, threaten, impede, obstruct, or lessen the dignity or authority of the court.

The trial judge, since he was a defendant in the civil action, recused himself, and another judge presided at the contempt hearings. Both Hogan and Coleson were adjudged in contempt of court on all three counts. The appellate court reversed as to both defendants on all counts. Neither the reversal of count I nor the reversal as to Coleson on counts II and III have been appealed to this court. We are concerned only with the question whether Hogan, the attorney in the criminal case, committed contemptuous conduct by filing a civil suit against the trial judge prior to sentencing in the criminal action. The appellate court's reversal on this issue was based upon its belief that the State failed to show that Hogan had the requisite intent. That court stated: "[T]he State had to prove beyond a reasonable doubt that [Hogan] filed the civil complaint with the intent 'to embarrass, hinder, or obstruct' the circuit court in the administration of justice." 37 Ill. App. 3d 673, 683.

This court stated in *In Re Estate of Melody* (1969), 42 Ill. 2d 451, 452: "Contempt of court has been generally defined as conduct calculated to embarrass, hinder or obstruct a court in

its administration of justice or to derogate from its authority or dignity, or bring the administration of law into disrepute." Direct criminal contempt may occur in either of two ways. The contemptuous acts may all take place in the presence of the judge so that all of the elements of the offense are within his personal knowledge. Alternately, the direct contempt may be committed out of the immediate physical presence of the judge but within an integral part of the court. (*People* v. *Jashunsky* (1972), 51 Ill. 2d 220, 223.) The filing of a document with the clerk of the court under the appropriate circumstances falls within this latter type of direct contempt, and it is not necessary that the document filed be contemptuous on its face. The very act of filing a document which tends to produce a result within the above-stated *Melody* definition constitutes a contempt. The filing in probate of a will known to be spurious is illustrative. In such a case, the mere filing, without more, is calculated and tends to embarrass or impede the court in the orderly administration of justice and is therefore contemptuous. See *In re Estate of Melody* (1969), 42 Ill. 2d 451; *In re Estate of Kelly* (1936), 365 Ill. 174.

Contrary to the holding of the appellate court, the failure of the prosecution to affirmatively prove the state of mind of the defendant is not fatal. In *Kneisel* v. *Ursus Motor Co.* (1925), 316 Ill. 336, a person, without having obtained leave of court, filed a petition in the circuit court of Cook County in a pending case involving certain assets of a receiver who had been removed by the court. On review this court stated that if the conduct constituted contempt it was direct contempt and stated: "Whether such a contempt has been committed depends upon the act and not the alleged intention of the offending party." 316 Ill. 336, 342.

Also, in *Anderson* v. *Macek* (1932), 350 Ill. 135, the court appointed a receiver who took possession of property involved in a mortgage foreclosure and put a padlock on the door and posted notices on the building. The owner of personal property

located on the premises had executed a chattel mortgage and the holder of the chattel mortgage, after having had prepared the necessary papers to levy on the chattels, placed them in the hands of a constable whom he thought was a deputy sheriff. The constable and the defendants entered the building and removed the chattels. This court stated: "Granting that defendants in error apparently thought, as there is some reason to believe, that they were warranted in their action * * *, it does not follow that they were not guilty of contempt. Whether a direct contempt has been committed depends upon the act and not upon the alleged intention of the offending party." (350 Ill. 135, 137-38.) To the same effect, see *People* v. *Denson* (1975), 59 Ill. 2d 546.

The defendant contends that the rule to show cause alleges the specific intent of the contemnor and that it was therefore incumbent upon the State to establish that in some way the defendant intended to obstruct or impede the court or to embarrass it in the administration of justice. We do not agree. A contemptuous state of mind may be inferred from a contemptuous act as herein defined. The intent may be inferred from proof of the surrounding circumstances and from the character of the action of the defendant. See *People* v. *Johnson* (1963), 28 Ill. 2d 441; *People* v. *Coolidge* (1963), 26 Ill. 2d 533.

In an effort to explain why the civil suit had to be filed while the matter of sentencing Coleson was still pending, Hogan directs us to the case of *O'Shea* v. *Littleton* (1974), 414 U. S. 488, 38 L. Ed. 2d 674, 94 S. Ct. 669. He argues that *O'Shea* indicates that standing to contest the challenged bail practices in Alexander County would have been lost to him had he not filed his suit prior to sentencing. (Assuming the correctness of this assertion, this does not justify the inclusion of Judge Kunce as a defendant in the civil action.) Judge Kunce did not participate in setting bail for Coleson. The only allegations in the damage suit dealing with Judge Kunce are that he "purported to exercise the administrative authority of the Illinois Supreme Court to effect an administrative flowing together" of the two cases filed

against Coleson and that this was a "continuation of the wrongful attachment and false imprisonment" of Coleson which had begun with the setting of bail. Precisely what these allegations signify, we do not know. Presumably, Judge Kunce entered an order consolidating the two criminal cases, which, of course, has nothing to do with the setting of bail. Judge Kunce could have been omitted entirely from the civil action without doing violence to Hogan's interpretation of the holding in *O'Shea*. The fact that he chose instead to include the presiding judge in the criminal case as a defendant in a $100,000 damage suit lends itself to the reasonable inference that the suit was calculated to affect the outcome of the case (*People* v. *Goss* (1957), 10 Ill. 2d 533) or to embarrass, hinder, or obstruct the court or derogate from the court's authority or dignity or to bring the administration of law into disrepute.

Judge Clayton, after a hearing on the rule to show cause, found that the complaint in the civil case was not filed in good faith, but was filed to hinder, cause delay, or impede the administration of criminal justice, and to interfere with the judicial process, and embarrass the court so as to lessen the court's dignity and authority. These findings are fully supported by the evidence.

Hogan also asserts as error the denial of his motion for substitution of judges. After Judge Kunce recused himself, Judge Clayton, of the same judicial circuit, undertook the hearing of the contempt charges. Hogan then moved for a substitution of judges asking that Judge Clayton disqualify himself and all other judges of the circuit, and that he ask this court to assign a judge from another circuit to hear the case.

Section 114-5 of the Code of Criminal Procedure of 1963 (Ill. Rev. Stat. 1975, ch. 38, par. 114-5) provides that in criminal cases there is an absolute right to a substitution of judges from two judges on general allegations of prejudice. The statute also provides for an unlimited number of substitution of judges for cause. It is well settled that a general allegation of prejudice

will not, however, support a motion to substitute more judges than is authorized by the statute, and the naming of a greater number of judges in a petition for substitution than is authorized by statute warrants the denial of the entire petition. (*People* v. *Myers* (1966), 35 Ill. 2d 311; *People* v. *Goss* (1960), 20 Ill. 2d 224; *People* v. *Chambers* (1956), 9 Ill. 2d 83.) The same principle applies in civil actions. (*Rosewood Corp.* v. *Transamerica Insurance Co.* (1974), 57 Ill. 2d 247.) The request of the petition for substitution from all of the judges in the circuit, supported only by a general allegation of prejudice, justified Judge Clayton's denial of the petition.

We conclude that Hogan committed a direct contempt by filing a civil action against Judge Kunce while the sentencing of Hogan's client, Coleson, was being considered by the judge.

It appears that following the hearing on the rule to show cause the judge took the matter under advisement. At a later date he filed his order with the clerk of the circuit court. The order contained not only the finding of the court that the respondent was guilty of contempt but also imposed sentences on the respondent of $750 and 30 days in the county jail on each count. The jail sentences were to be run concurrently. It is apparent that counts II and III are alternate allegations of the same contemptuous conduct. Count III contains a reallegation of count II and in addition alleges certain acts which are supported by the specific findings of Judge Clayton referred to above. The respondent Hogan should not have been found guilty and sentenced on both counts. The sentence as to count II should not have been imposed. The judgment of the appellate court as to count II is therefore affirmed.

The hearing on the rule to show cause concentrated on the question of contempt, and neither the State nor Hogan addressed the question of punishment. However, as noted above, the order entered by the judge not only found the respondent Hogan guilty of contempt but imposed the penalty of a $750 fine and a 30-

day jail sentence. Standard 7.4 of the American Bar Association Standards Relating to the Function of the Trial Judge provides:

> "Before imposing any punishment for criminal contempt, the judge should give the offender notice of the charges and at least a summary opportunity to adduce evidence or argument relevant to guilt *or punishment.*" (Emphasis added.)

In order to conform, at least partially, to the suggested standard, we do not believe the trial court should have imposed a jail sentence in this case without giving Hogan an opportunity to present evidence in mitigation of the penalty. In the interest of judicial economy, however, we deem it advisable not to remand the case for a hearing in mitigation as to the penalty but we will reverse the jail sentence imposed under count III and will affirm the fine of $750 imposed under that count.

Accordingly, the appellate court judgment is affirmed, except as to that portion of the judgment reversing the fine imposed against Hogan under count III; that portion of the appellate court judgment is reversed. The judgment of the circuit court is affirmed as to the imposition of the fine against Hogan under count III; its judgment is otherwise reversed.

Appellate court affirmed in part
and reversed in part;
circuit court affirmed in part
and reversed in part.

Supreme Court, U. S.
FILED
NOV 26 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-322

DENNIS HOGAN,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS EX REL. PEYTON H. KUNCE, Circuit Judge,

Respondent.

(On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Illinois)

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

QUESTIONS PRESENTED FOR REVIEW

1. (a). Whether the Illinois Supreme Court was constitutionally justified in applying the relevant Illinois law and finding that malicious intent is not required to support a conviction on a charge of criminal contempt, where the penalty imposed is a fine and 30 days in the county jail.

(b). Whether, if a finding of intent is required, the conduct of petitioner was such as to meet this requirement and was therefore contemptuous.

2. Whether any substantial federal question is raised by any of the following sub-issues:

(a). May an attorney whose client is about to be sentenced subsequent to his conviction for perjury, be properly found in contempt of court where he files a civil lawsuit unnecessarily naming as a defendant therein the sentencing judge, to contest an allegedly unfair bail procedure in which said judge played absolutely no part whatsoever?

(b). Where a contempt adjudication is predicated upon a number of independent counts, some of which allege privileged conduct, may the adjudication be affirmed on the basis of one of the counts which alleged non-privileged conduct?

(c). Was the Illinois Supreme Court correct in affirming the trial court's denial of a motion for substitution of judge where petitioner has failed to show an abuse of the trial court's discretion?

STATEMENT OF THE CASE

Respondent accepts the statement submitted by petitioner insofar as it relates to the nature and facts of the Coleson criminal trial for perjury and the presentencing report dispute. However, respondent submits the following account of the subsequent contempt proceeding in the interest of clarity.

Because of what he believed to be contemptuous conduct on the part of Hogan in filing the *Coleson* complaint, Judge Kunce cited that filing in two counts of contempt, in addition to the one concerning advice to his client not to talk to the presentence investigator. One count alleged that any suit should have been delayed until sentence has been passed (C. 18). The other count alleged that the filing of the suit was contemptuous because the "complaint has no basis in law or in fact"; that it was "spurious, invented and contemptuous per se"; and that it was not filed "in good faith . . . but so as to hinder, delay or impede the administration of criminal justice . . ." (C. 19).

On his own motion Judge Kunce directed that the contempt citations be heard before a different judge. The Honorable John Clayton, Chief Judge of the circuit, assigned himself to hear the case.

Coleson and Hogan moved for the assignment of a judge from outside the circuit (C. 32). This motion was denied by Judge Clayton as he felt he could be fair and impartial in hearing the charges against petitioner and his client (R. 6).

At the subsequent contempt hearing, in their stipulated position, the People supported the contempt citation against petitioner Hogan by arguing that the complaint filed in *Coleson* v. *Spomer* was filed to disrupt the court or embarrass the court so as to lessen the court's dignity and authority. (R. 33, 34).

In his stipulated position, counsel for petitioner Hogan set forth that attorney Hogan filed a civil suit alleging improper bail practices against the circuit court and three of its judges based on his conclusions from his reading of *O'Shea* v. *Littleton,* 414 U.S. 488, 94 S. Ct. 669 (R. 35, 36). Counsel for petitioner argued that the courts are embarrassed and their dignity and authority is lessened anytime there is a suggestion of possible lack of total objectivity (R. 56). Petitioner stated that no evidence existed to support an element of obstruction and a lack of good faith, but instead was disproved in that the judge disclaimed any prejudice from the filing of the civil suit (R. 56, 57).

Subsequently, points and authorities were submitted to the court by the People (R. 64-66) and the petitioner (R. 71-76), and a second proceeding was held before Judge Clayton on May 27, 1974 (R. 77).

The People argued that the possibility that bail bond procedures may have been incorrectly handled did not necessitate the filing of a $100,000.00 civil suit against the judge presiding in Coleson's pending perjury trial (R. 83), that the presiding judge was faced with imposing sentence on Coleson as required by statute at the time the civil suit was filed (R. 82, 83), that the *Littleton* decision did not dictate the filing of civil suits requesting monetary damages against a judge to preserve a point for review (R. 85), and that the law clearly indicated a judge of general jurisdiction is immune from civil suits for acts done in performance of his official duties (R. 87).

Counsel on behalf of petitioner argued that the State had offered no suggestion of any alternative methods to filing the civil suit against the circuit court and its judges (R. 93, 94) and that though a substantial body of law established that judges are exempt from suit, the petitioner

had a right to attack such body of law, while a criminal case was pending, by filing a civil suit against the judges (R. 94).

Upon consideration of all the evidence, Judge Clayton entered an order finding petitioner Hogan guilty of contempt (R. 99-106). It stated that petitioner had filed a civil action against the presiding judge and other judges for damages growing out of the Court's discretionary ruling (R. 102), and such civil action had no basis in law or fact for damages or other relief as to the Presiding Judge (R. 102). The contempt order stated that the civil suit had in fact interfered with the judicial processes (R. 102), that the civil suit at that time was not required by any statute of limitations, or otherwise required by state or federal case law, and that the suit could have been filed after the presiding judge had passed sentence in the criminal proceedings so as not to delay, hinder, or impede the administration of justice, nor cause the Presiding Judge to be embarrassed (R. 103). In addition, the contempt order declared that the civil complaint was not filed by petitioner in good faith to obtain the relief prayed for but in order to hinder, delay, or impede the administration of justice, and to interfere with the judicial processes, and to embarrass the court so as to lessen the court's dignity and authority (R. 103).

Consequently, Judge Clayton imposed on petitioner a $2,250 fine ($750 for each of the three counts), a thirty-day jail sentence, and reference to the Illinois lawyer disciplinary authority for professional sanctions.

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The remaining relevant facts concerning the civil action filed by petitioner and the decisions of the Illinois Appellate and Supreme Courts on appeal of the contempt adjudication are adequately set forth in petitioner's statement of the case.

REASONS FOR DENYING THE WRIT

I.

THE ILLINOIS SUPREME COURT WAS CONSTITUTIONALLY CORRECT IN HOLDING THAT SPECIFIC INTENT NEED NOT BE SHOWN TO SUSTAIN THE CONTEMPT CONVICTION.

Petitioner urges this Court to accept, as a principle of constitutional law, the Illinois Appellate Court's holding that a conviction for criminal contempt of court may not be sustained absent proof of criminal intent on the part of the alleged contemnor. However, an examination of the relevant law on the subject, with its historical background, and of the facts of this case leads inevitably to the conclusion that the Illinois Supreme Court was constitutionally correct in reversing the appellate court and holding that whether such a contempt has been committed depends upon the *act* and not the alleged intention of the offending party. (Appendix to petitioner's brief at 29).

The history of contempt in the common law (see Petition at p. 2) and the decisions of this Court on the elements of analogous regulatory offenses indicate that a finding of specific intent is not necessary to sustain a convicion for the nonserious type of criminal contempt of which petitioner stands convicted. This court, in the case of *Morissette* v. *United States,* 342 U.S. 346 (1952) explicitly recognized a certain category of offenses which, although distinguishable from such offenses as treason, are regarded as offenses against the authority of the state and by their doing result in injury to the state whatever the intent of the violator. Such offenses are of the type that cause impairment of the efficiency of controls deemed essential to the social order, and the penalties for the

violation thereof are usually relatively small. The then majority of this Court recognized, apparently with approval, that courts have held that the offending act alone makes out the crime and no intent need be shown. *Id* at 256.

It is this category of offenses into which petitioner's contempt conviction falls. Like those types of cases mentioned in *Morissette, supra,* this case reveals a situation where the act of the violator itself, regardless of his intent, disrupted the orderliness of "controls deemed essential to the social order", i.e., orderly judicial proceedings necessary to the prosecution of a crime against the People.

The penalty imposed on the single count before Your Honors was a $750 fine and a 30 day term in jail. Only the fine was sustained by the Supreme Court of Illinois. In a similar situation, a federal District Court in California found that, since no more than a 6-month sentence could be imposed upon the defendant for contempt for his failure to obey a grand jury subpoena, no specific intent was required for conviction. *United States* v. *Polizzi,* 323 F. Supp. 222, 226 (C.D. Cal. 1971), rev'd. on other grounds, 450 F. 2d 880 (9th Cir. 1971). In the instant case, since no maximum term that can be imposed for criminal contempt is prescribed by Illinois statute, we can look to the penalty actually imposed as the best evidence of the seriousness of the offense. *Bloom* v. *Illinois,* 391 U.S. 194, 211 (1968). The penalty given shows that the offense for which petitioner stands convicted was clearly a non-serious offense, not requiring a finding of specific intent under the principles announced in *Morissette* and *Polizzi, supra.*

The relevant state case law supporting respondent's position is set forth in the decision of the court below (Appendix to petitioner's brief, p. 27 *et seq.*) and there-

fore there is no need to restate it here. However, a number of the points raised by petitioner on this matter deserve to be responded to in more detail.

Contrary to petitioner's contention at page 16 of his brief, the Illinois Supreme Court's citing of *People* v. *Denson,* 59 Ill. 2d 546 (1975) does not show that the court failed to distinguish between civil and criminal contempt, because that case was not "essentially" a civil contempt case. In fact, that case presented a somewhat unique situation in that the trial judge had issued a single contempt order covering both civil and criminal contemptuous conduct. *Id.* at 556. Furthermore, petitioner's statement that the court below relied on the *Denson* case is incorrect since the opinion clearly states that the case was cited only as being "[t]o the same effect" as the holding in *Anderson* v. *Macek,* 350 Ill. 135 (1932). (A. 30).

The cases of *In Re Brown,* 454 F. 2d 999 (D. C. Cir. 1971) and *United States* v. *Seale,* 461 F. 2d 345 (7th Cir. 1972) (to the extent it may differ from the holding below) are distinguishable in that they involve federal rather than state contempt situations. Additionally, *Seale* involved a construction of a federal contempt provision, 18 U.S.C. § 401, whereas the case at bar concerns the validity of the holding of the highest court of a state as developed by the relevant prior case law of the state.

Petitioner's reliance on *Smith* v. *Goguen,* 415 U.S. 566 (1974) is misplaced. That case was concerned with a vagueness challenge to a law making public contemptuous treatment of the flag of the United States a criminal violation. The statute was declared void for vagueness because the term "contemptuous treatment" was not defined. The case patently has no applicability to the case at bar since no statute is here being construed and no "void for vagueness" claim has been raised.

II.

PETITIONER'S CONDUCT WAS SUCH THAT HIS CONVICTION FOR CONTEMPT WOULD BE SUPPORTABLE EVEN IF INTENT WAS REQUIRED TO BE PROVED.

Although the United States Court of Appeals for the Seventh Circuit in *United States* v. *Seale, supra,* upheld the requirement of general intent in federal criminal contempt cases, the court held that to meet this requirement, it was *not necessary* to show "an actual design to subvert the administration of justice", but rather, "the minimum requisite intent is better defined as a violational act done by one who knows or should reasonably be aware that his conduct is wrongful". *Id.* 461 F. 2d at 368. This holding clearly does not set up a specific intent requirement of the type advocated by petitioner and is not inconsistent with the decision of the Illinois Supreme Court below.

If the *Seale* standard should be held to be applicable to the state criminal contempt conviction of the case at bar, petitioner's conduct clearly evidenced the requisite intent.

As the People in the trial court pointed out, under the doctrine of *O'Shea* v. *Littleton,* 414 U.S. 488 (1974) it was not necessary for petitioner to file a civil damage suit before sentence to acquire a forum in which to air his concern over bail procedures (this is discussed in depth in the following section). The suit could have been filed after sentencing without prejudicing any right of the complainant, and by filing the suit before sentencing, the administration of justice was hindered and obstructed and the dignity and objectivity of the court was compromised.

Petitioner is an attorney, well aware of the doctrine of judicial immunity, and the complaint he willfully filed was a total contradiction to that doctrine. Furthermore, although Judge Kunce was named as a party defendant, the

complaint did not even allege facts that the judge took any action in the bail procedures which were the basis of the complaint. As the Illinois Supreme Court aptly noted, "Judge Kunce could have been omitted entirely from the civil action without doing violence to Hogan's interpretation of the holding in *O'Shea.*" (A. 31).

As an attorney, petitioner could reasonably be deemed to have known that the filing of such a civil suit, unnecessarily naming the very judge presiding over his client's pending case during the delicate interim between conviction and sentence when there was a dispute over cooperation in the pre-sentence report, would undoubtedly cause disruption of the pending criminal proceeding. Yet, he willfully filed the suit anyway. Clearly such conduct falls within the realm of an "intentional contempt" as outlined in *Seale, supra.*

III.

NO SUBSTANTIAL FEDERAL QUESTION IS RAISED BY THE PETITION ON THE FOLLOWING SUB-ISSUES:

A.

An Attorney, Whose Client Is About To Be Sentenced On His Conviction For Perjury, May Properly Be Found In Contempt Of Court Where He Files A Civil Lawsuit, Naming As A Defendant Therein The Sentencing Judge, To Contest An Allegedly Unfair Bail Procedure In Which The Judge Played Absolutely No Part Whatsoever.

Petitioner asserts that the holding of *O'Shea* v. *Littleton*, 414 U.S. 488 (1974) necessitated his filing of the civil suit against Judge Kunce and others, after the conviction and before the sentencing of his client, so as to avoid dismissal

in such a suit for lacking of standing. However, this misreading of the *O'Shea* opinion becomes obvious when one considers that this Court in fact said much more in that case than that the plaintiff class therein lacked standing to seek injunctive relief.

This Court, in *O'Shea,* after determining that no actual case or controversey was alleged in regard to the allegedly illegal bond-setting, sentencing and jury-fee practices in criminal cases engaged in by a magistrate and a circuit court judge, pointed out that state and federal procedures were available to parties who were prosecuted and faced trial or were illegally sentenced. Your Honors went on to state:

> Open to a victim of the discriminatory practices asserted under state law are the right to a substitution of judge or a change of venue, Ill. Rev. Stat., Ch. 38, §§ 114-5, 114-6 (1971), review on direct appeal or on post-conviction collateral review, and the opportunity to demonstrate that the conduct of these judicial officers is so prejudicial to the administration of justice that available disciplinary proceedings, including a possibility of suspension or removal, are warranted. Ill. Const. Art. VI, § 15(e). In appropriate circumstances, moreover, federal habeas relief would undoubtedly be available. 414 U.S. 488 at 502.

Respondent would also point out that the Illinois Supreme Court has specifically provided defendant a right to appeal from bail orders before conviction pursuant to Rule 604(c). Ill. Rev. Stat., 1973, Ch. 110A, § 604(c). Petitioner apparently chose not to avail himself of the proper remedies for the alleged grievance over the fixing of Coleson's bail. A logical reading of these alternatives would clearly seem to dispel any indicia of a "catch 22" situation being presented with regard to the contestation of bail procedures in Alexander County.

Furthermore, as the Illinois Supreme Court properly noted, even assuming the correctness of petitioner's assertion that standing to contest the alleged bail practices would have been lost to him had he not filed his suit prior to sentencing; this does not justify the inclusion of Judge Kunce as a defendant in the civil action. (A. 30). The Court elaborated as follows:

> Judge Kunce did not participate in setting bail for Coleson. The only allegations in the damage suit dealing with Judge Kunce are that he "purported to exercise the administrative authority of the Illinois Supreme Court to effect an administrative flowing together" of the two cases filed against Coleson and that this was a "continuation of the wrongful attachment and false imprisonment" of Coleson which had begun with the setting of bail. Precisely what these allegations signify, we do not know. Presumably, Judge Kunce entered an order consolidating the two criminal cases, which, of course, has nothing to do with the setting of bail. Judge Kunce could have been omitted entirely from the civil action without doing violence to Hogan's interpretation of the holding in O'Shea. The fact that he chose instead to include the presiding judge in the criminal case as a defendant in a $100,000 damage suit lends itself to the reasonable inference that the suit was calculated to affect the outcome of the case (*People* v. *Goss* (1957), 10 Ill. 2d 533) or to embarrass, hinder, or obstruct the court or derogate from the court's authority or dignity or to bring the administration of law into disrepute. (A. 30-31).

Petitioner seeks to overthrow this determination by characterizing it as violative of the doctrine announced in *Eaton* v. *Tulsa*, 415 U.S. 679 (1974). He asserts that "to affirm [Judge Kunce's contempt] citation on the theory that the suit was improper because it included one defendant too many, is to convict the petitioner of a charge never made against him. *Eaton* v. *Tulsa, supra.*"

The situation presented in *Eaton* is, however, distinguishable from that presented in the case at bar. This Court in *Eaton* found that the trial judge had rested a contempt conviction solely upon the use of a vulgar expletive by the defendant in open court. Your honors accordingly held that the Appellate Court's affirmance of the contempt conviction on the ground that the trial record revealed certain "discourteous responses" by the defendant to the trial judge was violative of due process since the defendant's conviction was sustained "upon a charge not made." 415 U.S. at 699.

In the instant case, petitioner was charged with three counts of contempt. Since the Illinois Supreme Court affirmed the conviction only on the basis of Count III, however, an examination of this count is necessary to determine if the charges made therein are reasonably to be found to encompass the conduct of petitioner which that Court declares to be supportive of the contempt conviction.

The trial judge stated in his order finding petitioner guilty of contempt that, *inter alia,* "the conduct and actions of defendant Dennis Hogan as set forth in Count III of the Rule to Show Cause was contemptuous". (R. 104). The charges made in Count III (C. 19) set forth a number of reasons why Judge Kunce felt that petitioner's filing of his civil action before sentencing was contemptuous. The Illinois Supreme Court's finding that the Judge could have been omitted from the civil action entirely can more than reasonably be said to fall within the scope of the charges made in points 6, 7 and 8 of Count III.

Therefore, it simply cannot be said that the Illinois Supreme Court sustained the trial court by treating the conviction as a conviction upon a charge not made, *Eaton supra,* 415 U.S. at 699, and the Court's finding should be upheld.

B.

The Contempt Adjudication Was Predicated Upon A Number Of Independent Counts, And The Adjudication May Properly Be Affirmed On The Basis Of One Of Those Counts.

Petitioner's argument that Count III, upon which his contempt conviction was affirmed, and Count I, alleging what has since been determined to be constitutionally protected conduct and not now before this Court, are "inextricably inter-related" (Br. 23) and that to uphold the conviction on a basis of Count III only is, therefore, a denial of due process, is imaginative but not logical or, for that matter, supported by the record.

Count I related to the petitioner's advising of his client not to answer certain questions propounded to him by the prosecution during an attempt to prepare a presentence report. The Illinois Appellate Court reversed petitioner's conviction on this Court finding his actions to be constitutionally protected under the doctrine of *Maness* v. *Meyers*, 419 U.S. 449 (1975). The state did not seek review of that part of the Appellate Court's reversal. Count II and III related, however, various charges surrounding petitioner's filing of a civil suit against Judge Kunce before sentencing. In that suit, petitioner sought to challenge bail procedures. How the filing of such a suit is "inextricably inter-related" with advice on Fifth Amendment privileges, respondent is unable to fathom. Each count stands on the respective allegations set forth in the Rule to Show Cause, and to urge that a conviction upon one count must be overturned because the conviction could not constitutionally be based on another count is ludicrous.

C.

The Trial Judge In The Original Trial, May Not Reasonably Be Deemed To Have Issued The Rule To Show Cause As A Defensive Tactic In The Civil Suit Filed By Petitioner.

Petitioner seeks to have this Court regard Judge Kunce's legitimate and justifiable issuance of the Rule to Show Cause as a use of official process to defend himself as a litigant. The weakness of this claim becomes obvious when one considers that the judge had obvious judicial immunity from such a suit. [*Bradley* v. *Fisher,* 13 Wall. 335, 20 L. Ed. 646 (1871), *Pierson* v. *Ray,* 386 U.S. 547 (1967)] and he therefore had no personal need to issue a show cause rule in order to defend himself. Judge Kunce issued the rule to initiate a procedure wherein petitioner could have to answer for his conduct—not as an unnecessary attempt to justify his own conduct.

It is true, as petitioner asserts, that every American Lawyer has the privilege of attempting to persuade the judiciary to change the law. But that fails to recognize the concomitant rule that such attempts must be by other than contemptuous methods.

D.

The Illinois Supreme Court's Affirmance Of The Trial Court's Denial Of The Petition For Substitution Of Judges Was Proper Since No Abuse Of Discretion Was Shown.

As regards the hearing of the contempt charges against petitioner and his client, Judge Kunce who had issued the rule to show cause properly recused himself from conducting the hearing and Judge Clayton, by virtue of his authority as the Chief Judge of the Circuit, assigned himself to hear the case. Petitioner's pre-trial petition for

substitution of judges, by which petitioner sought to have every judge in the circuit disqualified and to have a judge assigned from outside the circuit was denied by Judge Clayton, stating that "I feel I can be as fair and impartial in a hearing toward Mr. Hogan and Mr. Coleson as I could toward anybody at any time." (R. 6).

The Illinois Supreme Court, in affirming Judge Clayton's denial of petitioner's motion, stated the Illinois law on the matter and its conclusion as follows:

> Section 114-5 of the Code of Criminal Procedure of 1963 (Ill. Rev. Stat., 1975, Ch. 38, par. 114-5) provides that in criminal cases there is an absolute right to a substitution of judges from two judges on general allegations of prejudice. The statute also provides for an unlimited number of substitution of judges for cause. It is well settled that a general allegation of prejudice will not, however, support a motion to substitute more judges than is authorized by the statute, and the naming of a greater number of judges in a petition for substitution than is authorized by statute warrants the denial of the entire petition. (*People* v. *Myers* (1966), 35 Ill. 2d 311; *People* v. *Goss* (1960), 20 Ill. 2d 224; *People* v. *Chambers* (1956), 9 Ill. 2d 83.) The same principle applies in civil actions. (*Rosewood Corp.* v. *Transamerica Insurance Co.* (1974), 57 Ill. 2d 247.) The request of the petition for substitution from all of the judges in the circuit, supported only by a general allegation of prejudice, justified Judge Clayton's denial of the petition. (A. 31-32).

Petitioner's contention that he in fact had alleged not general, but specific allegations of prejudice in his motion for substitution of judges and that the Illinois Supreme Court's affirmance of the denial of his motion on the ground that he made only general allegations was error serves only to state the argument—not to answer it.

If petitioner seeks to have his motion regarded as a motion for substitution for cause, he must meet the additional burden of showing that Judge Clayton's denial of that motion was an abuse of discretion. *People* v. *Nickols,* 41 Ill. App. 3d 974, 354 N.E. 2d 474, 479 (3rd Dist. 1976); *People* v. *Goodwin,* 13 Ill. App. 3d 506, 301 N.E. 2d 126 (1st Dist. 1973) (abstract). This rule takes cognizance of the fact that the trial court is ordinarily in the best position to determine whether it harbors prejudice against a defendant and is unable to continue in the case in a fair and impartial manner. *People* v. *Nikols, supra., citing People* v. *Polk,* 55 Ill. 2d 327, 303 N.E. 2d 137 (1973). Judge Clayton, as evidenced by his statement repeated above, obviously felt that he could conduct the hearing on the charges of contempt in a fair and impartial manner regardless of what he may have theretofore expressed to be the feelings toward petitioner of a majority of the other judges in the circuit. Petitioner has failed to show that this determination by the Chief Judge was an abuse of this discretion and, accordingly, this claim must fail.

CONCLUSION

For all the foregoing reasons, respondent urges this Honorable Court to deny the instant petition for a Writ of Certiorari.

Respectfully submitted,

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